DOCJT

DEPARTMENT OF

CRIMINAL JUSTICE TRAINING

REVISED 2014

2014 CASE LAW UPDATES

FOURTH QUARTER

LEADERSHIP INSTITUTE BRANCH

LEGAL TRAINING SECTION

John W. Bizzack, Ph.D. / Commissioner

ACCREDITED BY

ACCREDITED BY IACET

INTERNATIONAL ASSOCIATION OF CONTINUING EDUCATION AND TRAINING

Leadership Institute Branch

J. R. Brown, Director of Training

859-622-6591 **JamesR.Brown@ky.gov**

Legal Training Section

Main Number **859-622-3801**
General E-Mail Address **docjt.legal@ky.gov**

Gerald Ross, Section Supervisor
859-622-2214 **Gerald.Ross@ky.gov**

Carissa Brown, Administrative Specialist
859-622-3801 **Carissa.Brown@ky.gov**

Kelley Calk, Staff Attorney
859-622-8551 **Kelley.Calk@ky.gov**

Thomas Fitzgerald, Staff Attorney
859-622-8550 **Tom.Fitzgerald@ky.gov**

Shawn Herron, Staff Attorney
859-622-8064 **Shawn.Herron@ky.gov**

Michael Schwendeman, Staff Attorney
859-622-8133 **Mike.Schwendeman@ky.gov**

Tom Szurlinski, Staff Attorney
859-622-8549 **Tom Szurlinski@ky.gov**

NOTE:

General Information concerning the Department of Criminal Justice Training may be found at http://docjt.ky.gov. Agency publications may be found at http://docjt.ky.gov/publications.asp.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

KENTUCKY

PENAL CODE – KRS 508 - ASSAULT IN THE THIRD DEGREE

Burgess-Smith v. Com., 2014 WL 7206624 (Ky. App. 2014)

FACTS: On August 29, 2009, Officer Muravchick (Lexington PD) responded to a 911 hang-up call. When additional officers arrived, in minutes, the officer told his fellow responders that he knew the house from a domestic call a few days before, in which a male subject "was known to carry a weapon and had absconded." That subject (not the defendant) had a warrant. The officers could hear a loud argument inside between a man and woman.

The front door was open and they could see down the hall, but no one was visible. When Officer Muravchick knocked, the female came to speak to him. She said she was fine and the wanted subject was not there. The officers, however, did a "protective sweep" because they couldn't be sure she wasn't under duress. In the process they discovered Burgess-Smith, whom Officer Muravchick recognized as possibly having an active warrant as well. He frisked Burgess-Smith and told him he was being detained, whereupon Burgess-Smith "threw his elbow down, pushed Officer Muravchick into a wall, struggled with Officer Muravchick, and ran off." Officer Maynard tackled him but lost him. Officer Muravchick was able to stop Burgess-Smith with a Taser and handcuffed him. While waiting for EMS, he ran a third time, during which time Officer Muravchick tried to Tase him, fell and sprained an ankle. Finally he was apprehended by being tased yet again.

Burgess-Smith was convicted with myriad offenses, including Assault 3rd. He appealed.

ISSUE: Does Assault 3rd require proof of a physical injury?

HOLDING: No

DISCUSSION: Under a number of arguments, including double jeopardy, Burgess-Smith argued he could not be convicted of Assault 3rd because there was no evidence he caused physical injury to Officer Muravchick. The Court looked at the statute and noted that charge does not actually require proof of a physical injury, but merely proof of acts that were an *attempt* to cause physical injury.

The Court upheld his convictions.

Wilson v. Com., 2014 WL 6686504 (Ky. App. 2014)

FACTS: On October 12, 2012, Wilson allegedly pointed his pistol at the ground and fired it, to scare off cats in his trash. However, instead, he managed to shoot into his neighbor, Mason's home and injured Mason's leg. The wound was treated in the ER and Mason was released.

Another witnesses claimed in fact, three shots were fired, at least one hit her home and that she confronted Wilson about it. (Wilson insisted he fired only one shot and then set off firecrackers.)

Wilson was charged with Wanton Endangerment, Assault 1st Criminal Mischief.[1] He was convicted of Assault and Wanton Endangerment 1st. He appealed.

ISSUE: Does Assault 2d require at least some indication of an intentional act?

HOLDING: Yes

DISCUSSION: Wilson argued that there was no evidence he intended to intentionally harm Mason and as such, he could not be convicted of Assault 2nd. The Court agreed that at trial, there was no proof that he was aiming at anything or anyone in particular. As such, the Court agreed, the jury instructions were flawed and he was entitled to a reversal. In addition, and separately, as evidence of the drugs found was also introduced to the jury, which was clearly improper, the Court agreed that required reversal of the Wanton Endangerment charge as well.

Cozart v. Com., 2014 WL 5421249 (Ky. App. 2014)

FACTS: On the day in question, Cozart allegedly entered his ex-girlfriend's home, assaulted, raped and sodomized her, and then held her against her will for over 20 hours. He was convicted of Unlawful Imprisonment 1st, Assault 2nd and violation of a DVO. He appealed.

ISSUE: Does holding someone for 20 hours, during the course of an assault, exceed the time to qualify for the kidnapping exemption?

HOLDING: Yes

DISCUSSION: Cozart argued that there was insufficient proof that his victim suffered a serious physical injury. The Court noted that determining whether there is serious physical injury "turns on the unique circumstances of an individual case."[2] In this case, the victim "suffered a concussion, five rib fractures, a fracture of her left cheek bone." The doctor testified that she "was the most severely injured assault patient he had ever seen." She had lost consciousness and her rib fractures were severe enough to cause a substantial risk of death. She testified that she still suffers constant pain from the rib and facial fractures, and she had scarring from the latter. The Court agreed that prolonged pain is a serious physical injury.[3] The Court agreed that he caused serious physical injury to his victim.

Cozart also argued that the Unlawful Imprisonment charge should have merged with the assault charged, because of the kidnapping exemption provision, KRS 509.050. The Court held that exemption did not apply because his holding of her for 20 hours was "neither immediate nor incidental to the assault he committed during the first four hours."

Cozart's convictions were affirmed.

---

[1] He also had several drug charges as a result of what was found in his home.
[2] Cooper v. Com., 569 S.W.2d 668 (Ky. 1978).
[3] Parson v. Com., 144 S.W.3d 775 (Ky. 2004).

Seabolt v. Com., 2014 WL 5410238 (Ky. 2014)

FACTS: On March 27, 2012, Baker was in his Spencer County home when he heard a vehicle in his drive. He saw a man and a woman, in an unfamiliar car. LaPointe (the female) got out and knocked on his door, Baker did not answer. Seabolt, the man, joined her and was heard to say that the garage was open so they could enter through there. Baker called 911. Lapointe and Seabolt turned the car around, with the trunk toward the garage. LaPointe returned to knock again, with Baker still observing. He saw Seabolt take two totes filled with tools from the garage to his vehicle. Baker then heard his security system announce that the basement door, which led from the garage, had been opened. Baker, armed, waited near those steps, inside the house. About that time, LaPointe began calling that the police had arrived. Baker watched as Seabolt quickly returned the totes to the garage as deputies pulled in.

When questioned, both said they were having car trouble and were just seeking to borrow tools. They came to the Baker home because they thought someone was home. However, nothing appeared to be wrong with their vehicle. Both were arrested, Seabolt specifically for Complicity to commit Burglary 2nd. He was convicted and appealed.

ISSUE: Is someone who enters a location with the apparent attempt to commit a theft entitled to an instruction for Criminal Trespass?

HOLDING: No

DISCUSSION: Seabolt argued that he was entitled to a jury instruction for Criminal Trespass. The Court noted that it would have to "determine whether it would be reasonable to conclude that Seabolt entered Baker's dwelling with no intent to commit a crime." The Court noted that the testimony of Baker set this case apart from Martin v. Com.[4] Baker's specific testimony was enough to conclude that it would be unreasonable not to infer a criminal motive for Seabolt entering.

Seabolt's conviction was affirmed.

PENAL CODE – KRS 515 - ROBBERY

Johnson v. Com., 2014 WL 5802292 (Ky. App. 2014)

FACTS: On September 18, 2008, Johnson forced his way in the Kleinhenz home in Jefferson County. He tried to shoot Elder, who was present, but the gun misfired. He then stabbed Elder multiple times. He also knocked down and tried to shoot Kleinhenz, but the gun misfired again. He demanded money from Kleinhenz, who gave him some cash. Johnson fled.

Johnson was convicted of Robbery 1st and Assault 2nd, as related to Kleinhenz. He appealed.

ISSUE: Are Robbery and Assault charges double jeopardy?

[44] 571 S.W.2nd 613 (Ky. 1978).

HOLDING: No

DISCUSSION: Johnson argued that the Robbery and Assault charges, with respect to the same victim (Kleinhenz) constituted double jeopardy. Kentucky uses the Blockburger[5] rule to determine if two offenses are double jeopardy, so the Court compared the two offenses and noted that he clearly committed Robbery (a use for force to accomplish a theft) – which did not require the use of a dangerous instrument – and an Assault 2nd, which did require a dangerous instrument (the gun, when being used to strike). Since each of the two charges required at least one element not in common, the Court agreed that there was no double jeopardy.

Johnson's conviction was affirmed.

Groves v. Com., 2014 WL 7205708 (Ky. App. 2014)

FACTS: On October 20, 2011, a man approached Groves at a Jefferson County McDonald's and asked him to go to a bank and cash a $2,300 check. In return, Groves, "homeless, broke and drug addicted" would receive $500. He agreed. The man left with Groves' ID and returned 30 minutes later with a printed check listing Groves as the payee. They went to a bank and Groves handed over the check. However, because of the amount, the bank checked, discovering that the payor (an auto sales business) had already issued a check bearing that same number to another party. When told that the payor was disputing the check, Groves left without either the check or his ID card. When he relayed this to the other parties, they left him.

Some months later, Groves was one of seven men arrested for trying to pass forged checks, each having a similar situation. Groves was convicted for Criminal Possession of a Forged Instrument, and appealed.

ISSUE: Is possession of a known "suspicious" check enough to prove Criminal Possession of a Forged Instrument?

HOLDING: Yes

DISCUSSION: Groves argued that there was no indication that he intended to "defraud, deceive or injure" anyone due to his possession of the check. The Court looked to Com. v. Benham and found more than sufficient evidence to prove that Groves knew that he was not supposed to have the check and there was likely something shady about it.[6] He had endorsed it on the back.

The Court upheld his conviction.

[5] Blockburger v. U.S., 284 U.S. 299 (1932

[6] 816 S.W.2d 186 (Ky. 1991).

PENAL CODE – KRS 520 - FLEEING AND EVADING

Davis v. Com., 2014 WL 5064187 (Ky. App. 2014)

FACTS: On September 16, 2009, while unmedicated for diagnosed mental illness, Davis walked to a suburban bank branch in Louisville. He "demanded all of *his* money" from a teller. Another teller, recognizing him from an earlier incident in which the bank manager was assaulted, activated the silent alarm, while other employees fled the area and locked the doors. The teller told him he had no account and thus she could not give him any money, and Davis became agitated. He threatened to kill her and threw a glass candy dish at her, injuring her slightly. He then walked out of the bank. Officer Betts (LMPD) responding, spotted Davis leaving the bank. He went in pursuit, on foot, but Davis did not stop. Eventually, Officer Betts chased him "through stopped traffic within the shopping complex." He arrested Davis, who then said he didn't rob the bank but did throw the dish.

Several charges were placed against Davis, including Fleeing and Evading 1st. His competency was questioned but ultimately, he stood trial. He was convicted of Fleeing and Evading, and appealed.

ISSUE: Is a foot chase through traffic enough for the First Degree of the offense?

HOLDING: Yes

DISCUSSION: Davis argued that his actions did not rise to the level of a substantial risk of harm that would support the Fleeing and Evading charge. Officer Betts had described the foot chase through the lot, and especially the cars waiting at a traffic signal. He "stated he feared the traffic control light could change from red to green at any second during the chase and the vehicles would begin moving and strike himself or Davis." The Court agreed that was sufficient to argue that the officer could have suffered serious physical injury as a result.

The Court affirmed his conviction.

PENAL CODE – KRS 531 - PORNOGRAPHY

Myers v. Com., 2014 WL 5489314 (Ky. App. 2014)

FACTS: Myers was apprehended following an investigation by Reed (OAG) in which his IP address in Kentucky was "associated with sharing or advertising files containing terms related to child pornography." The material was being shared through Limewire. The investigator saw 29 files with titles linked to child pornography and she was able to download two, which were later shown to the jury. Under subpoena, the ISP connected the IP address to Myers. The investigator obtained a search warrant and when executed, Myers identified the suspect computer and agreed he knew there was child pornography on it.

Baker, also with the OAG, testified concerning still images he recovered from the recycle bin and stated that 25 videos and other material were also recovered. Myers testified that the child pornography was an unintentional download when he was attempting to find adult pornography. He had arranged to have it erased, albeit unsuccessfully. He also testified that the computer was

available to his household – which included a roommate and the roommate's girlfriend. Reed testified that Limewire requires a "three-way handshake" – a process of verification - before material is downloaded, however.

Myers was convicted of Possession of Matter Portraying a Sexual Performance by a Minor. He appealed.

ISSUE: Is the fact that material is not generally accessible on a computer enough to make the owner of the computer not liable for having it?

HOLDING: No

DISCUSSION: Myers argued that at the time the search warrant was executed, the computer had been "cleaned" and that no one without specialized skills could view the material. (This was conceded by the testimony of the investigators.) He argued that since the statute is in the present tense, that since he didn't have current access to the material, he could not prosecuted for possessing it. The Court disagreed that present active possession was necessary to satisfy the statute.

Myers' conviction was affirmed.

NON PENAL CODE – DUI

Rader v. Com., 2014 WL 5314699 (Ky. App. 2014)

FACTS: On March 3, 2012, Trooper Hamby (KSP) responded to an anonymous call of a reckless driving on I-24, in Trigg County. He found and stopped the vehicle, finding Rader at the wheel. Rader's "eyes were bloodshot and glassy, he had a strong odor of alcohol emanating from his person, and his speech was slurred." He failed the FSTs and was arrested. He was taken to the location of the Intoxilyzer and found to have a BA of .172. He was charged with DUI (aggravated), reckless driving and related charges.

Rader moved to suppress the BA testing, noting that the instrument was not located in a jail or police station. (It is located in a secured basement location of the justice center, since Trigg County does not have a jail.) The Commonwealth argued the area was a detention facility as it is where prisoners are held pending transport by the jailer to other facilities. The judge personally examined the area in question and denied the motion. Rader took a conditional plea and appealed. Sitting as an appellate court, the Trigg Circuit Court affirmed the District Court. Rader further appealed.

ISSUE: Is a secured holding area in a mixed use facility a "detention center?"

HOLDING: Yes

DISCUSSION: The Court noted that the location was a secure holding facility and that the detention center was only a small part of the building as a whole. The Court agreed that although the facility is "mixed-use," that KRS 520 does provide a definition of a detention facility. Under that definition, a number of places had been so designated, including a private home when an

individual is under home incarceration. The area in question is secured and is "controlled by law enforcement personnel and is inaccessible to the general public." The Court noted that it was common for a jail to be physically connected to a courthouse and that didn't change the character of either. Further, under the burglary statutes, areas separately secured could be considered separate for burglary purposes.

The Court dismissed his "concerns" that so designating the secured basement as a detention facility somehow converted the entire building into one, thereby putting citizens at risk of, for example, being charged with promoting contraband for bringing in items not permitted in the jail. The Court believed that "the law –abiding citizens of Trigg County can reasonably disregard Rader's doomsday prophecies and may continue to transact whatever business necessary in the Justice Center without fear of unwarranted prosecution and potential confinement in its secured basement."

Rader's plea was affirmed.

SEARCH & SEIZURE – ARREST WARRANT

Stanfill v. Com., 2014 WL 7238633 (Ky. 2014)

FACTS: In December, 2010, Stanfill was arrested for manufacturing methamphetamine and related charges. That day, Reed had come by to pick up a tool and to collect money owed to him by Stanfill. They were in an outbuilding when police arrived. Reed was a convicted felon and knew Stanfill, who was on parole, could get in trouble because Reed was there. Reed testified he saw no evidence of manufacturing other than the odor of ammonia.

On the day in question, Officer Hendricks and Officer Sorrells (Parole), along with Deputy Steen went to Stanfill's residence to arrest him on parole violations, including a positive methamphetamine test. Deputy Steen noticed a chemical smell from an outbuilding and heard two male voices. He ordered whoever was inside to come out; Stanfill emerged. He was arrested. Deputy Steen swept the building and found Reed hiding.

It was determined that white pellets, in a baggie, found on Stanfill were ammonium nitrate, so Det. Garland (Pennyrile Narcotics Task force) obtained a warrant. Upon searching, they found a number of items indicating a meth lab, and a "suspected one-step lab" was found in the outbuilding. He got a second warrant, for the house, and seized a number of items there, as well.

Steen was eventually convicted of methamphetamine manufacturing, and appealed.

ISSUE Is it improper to look for a subject away from the house but still on the property when officers have an arrest warrant?

HOLDING: Yes

DISCUSSION: Stanfill argued that Deputy Steen's search was unreasonable and tainted the subsequent warrant obtained by Det. Garland. The trial court had noted that the knowledge the officers already had about Stanfill and his possession of incriminating items when arrested, was certainly enough to justify the search warrant. When they went to the home, he did not answer the

door, which explained their "scouting around" to locate him. When only Stanfill emerged, after the deputy had heard two voices inside, it was appropriate for Deputy Steen to do a protective sweep. He did not seize any items inside or take particular note of any items, either. The Court noted that items found in a lawful protective sweep are admissible.[7] But, it noted, the search warrant did not even cite any observations or items found during the sweep, but relied only on information obtained separate from the sweep.

The Court upheld his conviction.

SEARCH & SEIZURE – SEARCH WARRANT

Barlow v. Com., 2014 WL 5064766 (Ky. App. 2014)

FACTS: Pursuant to a search warrant, police searched Barlow's Metcalfe County property. They found methamphetamine manufacturing items in the house, storage shed and yard, as well as methamphetamine and marijuana. The warrant contained information from a CI regarding Barlow's prior drug activity and the possibility of current involvement. Barlow moved to suppress, and was denied. He was convicted and appealed.

ISSUE: Is corroborated information sufficient to support probable cause?

HOLDING: Yes

DISCUSSION: Barlow argued that the search warrant was not sufficiently based on probable cause. The Court looked to the language of the warrant to determine if the information was 'stale." In addition, Deputy Neal did some corroboration, questioning the CI extensively and receiving detailed information about a potential cook. The Court noted that although the affidavit did not report specific dates and times as to criminal behavior in the past, the information strongly indicated that Barlow would be cooking that very night and would have ingredients on hand. Added together, it indicated that that he was involved in an ongoing methamphetamine operation and that it was long-term.[8] The CI had been reliable in the past and was reporting on specifics that had been observed personally.

The Court upheld Barlow's conviction.

Gidron v. Com., 2014 WL 7206861 (Ky. App. 2014)

FACTS: On July 23, 2008, Det. Presley (Louisville Metro PD) obtained a search warrant for Gidron's home. Originally given a tip from a CI, it was corroborated by personal observation of the detective, along with a controlled buy by a reliable CI. That same day, a substantial quantity of cocaine, pills and cash were found. Gidron was charged with trafficking. When his request to suppress was denied, he took a conditional guilty plea and appealed.

ISSUE: Is specific information from a known reliable CI sufficient to provide probable cause?

[7] Guzman v. Com., 375 S.W.3d 805 (Ky. 2012).
[8] Lovett v. Com., 103 S.W.3d 72 (Ky. 2003); Sgro v. U.S., 287 U.S. 206 (1932).

HOLDING: Yes

DISCUSSION: The Court looked to Beemer v. Com., which adopted the rule of Illinois v. Gates in the "totality of the circumstances approach to determining whether probable cause exists to issue a search warrant."[9] Specifically he argued there was a lack of proof as to the reliability of the CI, noting that Kentucky "has held that reliability does not necessarily imply a pattern of behavior or history; reliability can be obtained from the confidential source giving police officer's information, and that information turning out to be true."[10] Although one of the statements was improperly conclusory, it was supported by evidence of a controlled buy and thus established the stated reliability of the CI. The fact that the CI went inside a particular residence and emerged with cocaine was enough to prove that drugs were present there at the time. The officers had a good faith belief that what was purchased was, in fact, cocaine, although it was not field-tested. Since the officer had a history of working drug cases, it would be presumed that the combination of information available was enough to prove that it was, in fact, likely to be cocaine.

The Court upheld the warrant and Gidron's plea.

SEARCH & SEIZURE – TERRY STOP

Neal v. Com., 2014 WL 5488176 (Ky. App. 2014)

FACTS: On December 24, 2012, Neal (along with Fairman) was stopped by Officer Smith (Radcliff PD) for speeding. (Later testimony indicated that the stop was not, primarily, for speeding, but because the officer thought it might have been involved in a recent robbery.) Neal had already parked and walked away from the car when Officer Smith approached. Together, they walked back to Neal's car, where a "clear, torn plastic bag was visible inside." Neal consented to a search and a marijuana pipe was located. Neal was charged with not having a valid OL and drug paraphernalia.

Neal moved for suppression, arguing that he wasn't in the vehicle when stopped. He argued that the search of the vehicle lacked exigent circumstances and that the pipe was not in plain view. Officer Smith testified that he'd gotten consent from both men to search them and had found "quantities of cash" on each. Lt McCloud, who was also at the scene, testified about the torn baggie. Officer Smith questioned them because of his suspicions about their involvement in the robbery and thought the pair "wanted to get away from the vehicle." He had confirmed the vehicle belonged to Neal's father. They accessed the vehicle to confirm, primarily, whether the rear taillight was working, which had been an issue in the suspect vehicle. Neal claimed to have not given consent or handed over his keys, but that Lt. McCloud had said they were searching on probable cause due to the torn baggie. He argued he'd been seized while on the sidewalk and at that time, Officer Smith lacked any reasonable suspicion to do so. Ultimately the trial court denied the suppression motion. Neal took a conditional guilty plea and appealed.

ISSUE: May a driver be held when there is an ongoing investigation?

HOLDING: Yes

[9] 665 S.W.2d 912 (1984); 462 U.S. 213 (1983).
[10] Blane v. Com., 364 S.W. 3d 140 (Ky. 2012).

DISCUSSION: Neal first argued that "his continued detention by Officer Smith" was improper but the Court agreed there was sufficient reasonable suspicion to do so. The Court agreed that he was, in fact, seized, however. Looking to Strange v. Com.,[11] the Court agreed that the officers had a valid reason to bring Neal back to the vehicle to "complete his inquiries into the ownership of the car and whether it could be legally driven." With respect to the plain view of the torn baggie, the Court agreed that the "torn baggie was consistent with the use of marijuana, and the officer who testified explained that a piece would be torn off when the baggie was tied once the marijuana was placed inside," and as such, was sufficient to justify the search. Further, the Court agreed that Neal did, in fact, give consent.

Neal's plea was upheld.

SUSPECT ID

Beard v. Com., 2014 WL 6544495 (Ky. App. 2014)

FACTS: On November 11, 2012, Villagrana and Robles met two women at a Lexington business and took them back to Villagrana's apartment. Turner, one of the women, requested they go on to her house; the group proceeded there. Once there, Villagrana and Robles were confronted with two men, both masked and armed with shotguns. They were bounded with duct tape and robbed of wallets and cell phones. After a few minutes, the tape was removed and the men were forced to drink an unknown liquid (Visine). They were told to get back into Villagrana's car and Beard, now unmasked, got in behind them. Villagrana was ordered to drive and did so, but refused to run a red light. Beard got out, got into a second car, driven by Happy, and sped off. Villagrana and Robles went back to Villagrana's apartment and called police.

Officer Carrington took the information and obtained descriptions. He went to the suspect address with the two men and parked nearby. Officers did a knock and talk at the back door (because there was a dog on the front porch) and Beard left through the front door. He was seized and detained, wearing a shirt that was described by the victims. Officer Carrington obtained consent from Turner to search and found black masks and used duct tape. Beard, Turner and Happy were taken to the car for a show-up and both men immediately identified Beard and Turner. They could not identify Happy – although he was the same size and such of the second man, he had remained masked the entire time.

Beard was charged and moved to suppress the identification, which was denied. He took a conditional guilty plea to Robbery 2nd and Unlawful Imprisonment . He appealed.

ISSUE: Although suggestive, are show-ups a valid process?

HOLDING: Yes

DISCUSSION: The Court agreed that although show-ups are "indisputably inherently suggestive," that they "have been held to be necessary in some instances because they take place immediately after the commission of the crime and assist the police in properly identifying

[11] 269 S.W.3d 847 (Ky. 2008).

suspects."[12] It can be admitted "if, under the totality of the circumstances, the identification is found to be reliable."[13] Reliability is determined when the trial courts assessed "the possibility of an irreparable misidentification based up the" Biggers[14] factors.

> (1) The opportunity of the witness to view the defendants; (2) the witness's degree of attention; (3) the accuracy of any prior descriptions; (4) the level of the witness's certainty when confront the defendant; and (5) the time between the crime and the confrontation of the defendant.

In this case, the trial court had properly done so and found that it was a reliable identification. As such, the Court upheld the denial of the motion to suppress and Beard's subsequent plea.

INTERROGATION – RIGHT TO COUNSEL / SILENCE

Williams v. Com., 2014 WL 541026 (Ky. 2014)

FACTS: On August 14, 2010, Williams shot Martin to death in Lexington. Williams argued later that he acted in self-defense and protection of another. He was not arrested until March, 2011, however, because the investigation into the murder had gone cold. He initially denied having shot Martin (whose body had been dumped and later found), and denied that a witness (Blevins) had been present. Later, however, the witness claimed that Martin had assaulted her and that had precipitated the shooting. Williams was ultimately convicted of Manslaughter 1st and Tampering, and appealed.

ISSUE: Is a conditional request for an attorney enough to invoke Edwards?

HOLDING: No (but see discussion)

DISUCSISON: Among other issues, Williams argued that he'd been improperly questioned after he'd invoked his right to counsel. He had been given Miranda prior to being interrogated and they'd discussed possible charges. After much discussion as to "what would happen if Williams got a lawyer" – including the detective noting that "he believed a lawyer would tell Williams the same things the detectives had been telling him." Williams agreed to this. The Court noted that ambiguous or equivocal references to an attorney are not a true invocation. Under Edwards v. Arizona, "'"the suspect must unambiguously request counsel," meaning that "he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney,"[15] The Court agreed his statements in this case "fall well short of this mark." The Court noted his "initial reference to a lawyer was conditional – his response to a hypothetical question" posed by the detective.

Williams' conviction was affirmed.

---

[12] Savage v. Com., 920 S.W.2d 512 (Ky. 1995).
[13] Com. v. Parker, 409 S.W.3d 350 (Ky. 2013).
[14] Neil v. Biggers, 409 U.S. 188 (1972)
[15] Edwards v. Arizona, 451 U.S. 477 (1981) (quoting Miranda v. Arizona, 384 U.S. 436 (1966). Smith v. Illinois, 469 U.S. 91 (1984)).

Bartley (Pamela) v. Com., 445 S.W.3d 1 (Ky. 2014)

FACTS: On July 31, 2007, officers responded to the Bartley's home in Montgomery County. Relatives were concerned because Carl Bartley had failed to appear to a meeting with a family member and had not responded to multiple attempts to contact. They were particularly concerned "because of recent difficulties in his marriage," which over 38 years had become tumultuous – made more volatile by Pamela learning that Carl had been involved in a long term affair. Officers were allowed inside by family members who had a key. Nothing was found initially but the family encouraged another search because Carl's car wasn't in the garage, but parked outside, which was very unusual. A second search revealed his body, hidden underneath cardboard and blankets, between two vehicles in the garage. He had been shot in the head.

Det. Bowling (KSP) took charge. When he arrived, family members indicated they believed Pamela had killed him. When she arrived at the crime scene (having reportedly been at her daughter's home), she stated she would not speak without an attorney. About a month later, Pamela reported that she and her son had been chased and shot at, and that her car window had been broken out with a baseball bat by Carl's mistress's brother (Lee). She asked to speak with Det. Bowling.

Det. Bowling met with her and they sat in in his car, in her driveway, for some two hours. The conversation, which lasted almost two hours, was recorded and ultimately played at trial. It indicated she spoke with her attorney who apparently cautioned her to speak only of what had happened that day. Det. Bowling gave her Miranda warnings and she agreed, limiting the scope of the discussion. She "proceeded to tell Detective Bowling a basic account of the alleged attack, but interwoven in this account, [she] implicated Thomas Lee in the murder of her husband." During the discussion, in which she blamed Lee, "Detective Bowling began to ask pointed questions about [her] involvement in her husband's murder." He asked about the location of the handgun she was known to carry and what time she'd left her daughter's house on the day of the murder. The "pattern of the nearly two-hour conversation was circuitous in nature," going back and forth between his assertions she was involved in the murder, to which "she would not answer or would comment that she should not answer." She would then circle back to the events of the attack on her car. They would then casually discuss other topics.

Subsequently, Pamela was indicted for murder. She objected to the use of the recording, arguing she'd "clearly invoked her right to remain silent" about anything else that had occurred. The Court allowed the recording in "almost its entirety" and she was convicted of Manslaughter 2nd. Upon appeal, the Court of Appeals affirmed the conviction, finding that although she had invoked her right to remain silent, by accusing Lee, she'd "impliedly waived her right to remain silent." She further appealed.

ISSUE: Does the privilege against self-incrimination apply to someone not in custody?

HOLDING: No

DISCUSSION: The Court agreed that "privilege against self-incrimination has been recognized as being especially important in the context of police interrogations." In Miranda, "the U.S. Supreme Court held that any person who is in custody and subjected to police interrogation must be informed of his right against self-incrimination, or as standard in Miranda warnings, his

right to remain silent." However, the Court agreed, the "accused who "desires the protection of the privilege ... must claim it"[16] and must do so unambiguously.[17] At that point, questioning must stop, and "If the police continue to press the issue, and the defendant makes incriminating statements, those statements are properly suppressed."

In addition, even prior to Miranda, the Court had held that "the U.S. Supreme Court held that "the Fifth Amendment ... forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[18] Further, in Miranda, it reiterated that it could not be used at trial that the defendant "stood mute or claimed his privilege in the face of accusation."

Breaking down the issues, the Court noted that first, she was "not technically entitled to receive Miranda warnings prior to her interview with Detective Bowling because she was not in custody." The meeting was at her request and in her driveway. Statements made during the interview indicated she clearly felt that she could terminate the interview at any time by getting out of the car.

With respect to impeaching her with her statements, the Court ruled in Jenkins v. Anderson that a defendant may be impeached by his pre-arrest, pre-Miranda warnings silence, noting that "no governmental action induced petitioner to remain silent before arrest" and that "[c]onsequently, the fundamental unfairness present in Doyle is not present in this case."[19] Most recently, in Salinas v. Texas, involving a "pre-custodial, pre-Miranda-warnings interview," the Court agreed that "silence alone was not enough to invoke the protections of the Fifth Amendment, and thus the government's use of the defendant's silence was permissible because his silence was not under the auspices of his Fifth Amendment privilege."[20]

Further, in Green v. Com., the Court agreed it was error to call attention to someone who had remained silent in the prosecution's case, but in both Green and Hall, the silence came after an arrest.[21] Here, however, she was not under arrest, but unlike Salinas, she had been given Miranda and had invoked. Courts in different states had reached opposite conclusions about such situations, but Kentucky agreed that "if a defendant is warned of his right against self-incrimination, and the defendant explicitly invokes that right, the government is estopped from using the defendant's silence against him as substantive evidence of guilt." This is true even if the "Miranda warnings are given unnecessarily."

Further, selective silence is also permitted. The Court noted that:

> … there is a strong policy reason for providing all citizens, including those under investigation for a criminal offense, the right to turn to police when they believe they are in danger without sacrificing their right to silence and inviting police to have another bite at the interrogation apple. Appellant called police to report that she had been shot at and that she was in fear for her life. There was no evidence elicited in this case showing that her story of being shot at was meritless. After consulting with her attorney, she indicated the scope of

[16] United States v. Monia, 317 U.S. 424 (1943).
[17] Berghuis v. Thompkins, 560 U.S. 370 (2010).
[18] Griffin v. California, 380 U.S. 609 (1965).
[19] 447 U.S. 231 (1980); Doyle v. Ohio, 426 U.S. 610 (1976).
[20] 133 S. Ct. 928 (2013).
[21] Green v. Com., 815 S.W.2d 398 (Ky. 1991); Hall v. Com., 862 S.W.2d 321 (Ky. 1993).

> what she was willing to talk about and expressly stated that she only wished to discuss the events of September 7. Detective Bowling, however, seized the opportunity to interview [her] about her involvement in Carl's murder, despite her numerous objections and pleas to Bowling to stay on topic.
>
> If the Court were to decide that her silence, when asked questions about another incident for which she was being investigated, was admissible, we would greatly disincentivize criminal suspects from using police services in bona fide emergency situations. A decision to the contrary would chip away at the notion that a person is innocent until proven guilty, as we would be tacitly approving police taking advantage of potential emergencies to conduct interrogations about unrelated matters even where a suspect has unambiguously invoked and exercised her right to remain silent, albeit selectively.

Further, although the Court agreed that she did not "impliedly waive[] her right to remain silent by repeatedly mentioning matters other than the … incident [that day]. Usually, such statements are made in the "course of custodial interrogation." A waiver must show that the accused understood their rights and chose to go forward in a way "inconsistent with their exercise" and that showed the individual was relinquishing the protections of the rights. The Court noted that Bartley had only once willingly brought up her husband's murder, but that instead, Det. Bowling repeatedly asked about issues related to it.

> A careful review of the interrogation clearly demonstrates that Detective Bowling had no intention whatsoever to discuss the September 7 events and he asked no questions about those events after the first few minutes of the interrogation. It is likely that Detective Bowling did not believe [her] story of being shot at that evening and thought she was lying to implicate Thomas Lee. To the Court's knowledge, however, nothing was introduced in the record that indicated that [she] was lying about the September 7 events, nor does it matter whether her story was true for purposes of deciding whether she waived her right to silence. Rather, Detective Bowling treated the interrogation as an opportunity to discuss solely Carl's murder. [She] remained silent or re-invoked her right to remain silent repeatedly throughout the two-hour interrogation, and only a few instances tangentially referred to Carl's murder. We cannot say that [she] implicitly waived her right to remain silent, and the entire two-hour interrogation was inadmissible both under Miranda and its progeny.
>
> Put bluntly, a citizen who calls on the police for help after an attack, and repeatedly invokes her right to remain silent on other matters, cannot be held to have impliedly waived her right to silence when an officer repeatedly ignores her attempts to remain silent on other matters, even if that persistence may lead to a few incautious statements. This is not a game, where the craftiest and most persistent police interrogator wins. Justice loses when the spirit and intent of the Miranda warnings' protections are ignored to obtain a "gotcha" question that, standing alone, might imply waiver. Instead, the entirety of the questioning must be reviewed to determine whether the defendant knowingly waived an asserted right to silence.

The Court agreed that a waiver carries a heavy burden, and must comport with Johnson v. Zerbst, in that a "waiver must be determined on "the particular facts and circumstances surrounding that case,

including the background, experience, and conduct of the accused."[22] In this case, the Court concluded she did not relinquish the protections of invoking her right to silence.

As such, the Court agreed that admitting the recording was error in the face of her repeated invocation of the right to remain silent. As such, the Court reversed the judgment and remanded the case.

Spears v. Com., 448 S.W.3d 781 (Ky. 2014)

FACTS: Kenny Spears and Medlin were both stabbed to death during a fight at Kenny's home, in Cumberland County. Carl Spears admitted he was present, but claimed the two "inflicted the fatal wounds upon each other. All were intoxicated. Carl claimed that when they began fighting he tried to break it up and suffered minor injuries. He also claimed to have attempted CPR. He went to two different homes to try to call 911 and was finally able to call, but stated that he would only speak to the sheriff and that he "may not even do that until I talk to an attorney."

Carl was indicted with two counts of murder. At trial, a witness claimed that Carl had admitted the killing, and that "he had watched Kenny and Medlin die and that he described their deaths in gruesome detail." Forensic evidence was presented that showed his blood on the murder weapons, "mingled with the blood of the respective victims." Spears was convicted and appealed.

ISSUE: Must an invocation of counsel be clear and explicit?

HOLDING: Yes

DISCUSSION: Spears argued that during testimony, Det. Dubree testified twice that he "had asked for a lawyer." In fact, he argued, he "had *not* asked for an attorney or refused to talk to police." The only basis for Det. Dubree's statement was what he'd the 911 dispatcher that he would only talk to the sheriff. In fact, the Sheriff testified that he had discussed the incident with Spears after providing Miranda and he'd not asked for any attorney.

The Court agreed with the "general principle of Doyle[23] that in a criminal case, some prejudice to the defendant will ordinarily flow from evidence suggesting that he declined to cooperate with the police and chose instead to remain silent until he could consult an attorney." The Court agreed that the testimony was improper because in fact, he had never made the alleged statement. However, other evidence should have dispelled any impression that Spears did not cooperate and given the totality of the evidence, his guilt was adequately proven.

The Court affirmed Spears's conviction.

[22] 304 U.S. 458 (1938), See Also Berghuis, 560 U.S. at 385 (citing Zerbst, 304 U.S. at 464).
[23] Doyle v. Ohio, 426 U.S. 610 (1976).

TRIAL PROCEDURE / EVIDENCE – OFFICER WITNESS

Mundt v. Com., 2014 WL 6845558 (Ky. App. 2014)

FACTS: Mundt was involved the murder of Carroll, along with his lover, Banis. When arrested, both accused the other of suggesting that they rob (and ultimately murder) Carroll. "They also claimed that the other unexpectedly attacked Carroll" – killing him. They agreed, however, that together, they'd both buried Carroll in the basement of their apartment building (which had a dirt floor). Both were charged and Banis was tried first. Mundt testified against Banis as part of a sentencing deal. (Banis did the same, in exchange for a more lenient sentence.) Mundt was ultimately convicted of Complicity to Robbery and Tampering with Evidence. In both cases, the primary investigatior was designated to sit with the prosecutor at trial, and in all pretrial proceedings. He appealed.

ISSUE: May an officer be designated to sit with the prosecutor?

HOLDING: Yes

DISCUSSION: At Mundt's trial, there was extensive discussion over whether Banis would, in fact, testify – as it would be over Mundt's objection. The Court initially decided that Banis could not do so, but mid-trial, agreed that he could do so. During that time frame, a meeting was held in which the primary investigator was present and Mundt argued that his presence at that meeting violated the KRE 615, the separation of witnesses rule. However, it was noted that an exception to that rule exists and that "[a]n officer or employee of a party which is not a natural person designated as its representative by its attorney[.]" In this case, Det. Lesher was so designated and as such, that allowed his presence at the meeting. Since the rule "does not prohibit interaction between or among witnesses outside the courtroom", the Court agreed that it was not improper, especially since the witness was available for cross-examination.[24]

The Court affirmed Mundt's conviction.

TRIAL PROCEDURE / EVIDENCE - CHARGES

Moore v. Com., 2014 WL 7238215 (Ky. 2014)

FACTS: The Lexington Fire Department responded to an apartment fire, and upon investigation, determined that the fire originated in Apartment 6. They determined that the gas stove had all burners on high and the pilot light extinguished. Witnesses provided information that led to Moore, who lived there, as a suspect. During the same time frame, Officer Taylor had responded to a nearby theft report, in which a gas mask was stolen, and a cell phone left behind belonged to Moore. Moore was arrested when he was found "down" by EMS, unresponsive on the ground, in possession of a gas mask and other suspicious items. Chief Blankenship, of the LFD, questioned him about the fire and Moore responded "You must think I set my apartment on fire."

[24] Woodard v. Com., 219 S.W.3d 723 (Ky. 2007) (overruled on other grounds by Com. v. Prater, 324 S.W.3d 393 (Ky. 2010)).

Moore was charged with Arson, RSP, Wanton Endangerment (13 counts) and related charges. The Wanton Endangerment charges resulted from Chief Blankenship determined that 13 residents were in the building at the time of the fire. At trial, however, only four residents testified, although the names of all were presented. Moore was convicted and appealed.

ISSUE: Must all Wanton Endangerment charges be linked to specific victims, who then testify?

HOLDING: Yes

DISCUSSION: Moore argued that it was improper to charge him with 13 counts, because only four were proved at trial. The Court agreed that there was no hearsay exception that allowed Chief Blankenship to give a statement, and as such, his testimony on the other nine was inadmissible. However, the Court upheld his sentence as there was no indication that the emphasis on 13 potential victims affected the jury's decisionmaking. Specifically, in the Arson 1st charge, the number of potential victims was immaterial.

The Court dismissed nine of the charges, but upheld the sentence.

Com. v. Hammond, 2014 WL 6685990 (Ky. App. 2014)

FACTS: In June, 2006, intruders entered Sheckles' home and murdered her boyfriend, Sawyers. A few hours later, Cherry was shot and killed in a parked car. Two weeks later, Williams was shot and killed on his front porch. Hammond was arrested and charged with the murder of Sawyers and Cherry and the burglary of Sheckles' home. He was later identified as having killed Williams as well. The Williams murder was to be tried separately from the Sawyers-Cherry murder. However, they Commonwealth was given a dismissal without prejudice because Sheckles could not be found. (Ultimately the Williams' case was dismissed as well, when a "key witness asserted his Fifth Amendment privilege not to testify.") When Sheckles was found, Hammond was reindicted – but then, "Sheckles was shot and killed as she sat in a park near her home." Eventually all three cases were consolidated and a joint trial was held – Hammond was convicted. He appealed on several points. The Supreme Court ruled that joining the two cases was improper, as was the admission of Sheckles' out of court statement – under the doctrine of forfeiture by wrongdoing. The cases were severed and again, the Commonwealth moved to admit Sheckles' statement implicating Hammond. When that was denied, the Commonwealth appealed.

ISSUE: Must evidence in a Parker[25] hearing be authenticated?

HOLDING: Yes

DISCUSSION: Although Hammond was incarcerated when Sheckles was murdered, the Commonwealth put on evidence that suggested that he was involved in soliciting the murder – done by a third party. At the Parker hearing, two LMPD detectives presented their "case" against Hammond as having done so, presenting a number of documents. The Court looked to KRE 804(b)(5) – which allowed that "a statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" –

25

will not be excluded by the hearsay rule, because it would be wrong for them to profit by their actions.[26] The Court noted that there was an opportunity to cross-examine the detectives as well.

The court stated that the Supreme Court decision had specifically stated that a Parker hearing should be held and that documents put into evidence must be properly authenticated. As such, finding that the trial court did not do as it was directed to do, it reversed the trial court's decision, finding that in fact, the Commonwealth had provided authentication of the evidence necessary. The Court indicated that the testimony "may be admitted in future proceedings in this case."

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

Branham v. Com., 2014 WL 7206582 (Ky. App. 2014)

FACTS: On September 9, 2009, Det. Clark (KSP) arranged for a CI to make a buy from Branham. The CI had known Branham for many years and was able to purchase 5 Oxycodone pills. An audio recording corroborated the CI's testimony. Branham challenged the CI on cross-examination, alleging he'd been charged as well and was "attempting to help himself." Det. Clark testified as to what he'd done with respect to the investigation and mentioned that he'd made three drug transactions with Branham. Upon objection (because Branham was only on trial for one), the judge admonished the jury to disregard statements related to other transactions. Branham was convicted in Carter County for Trafficking 1st. He appealed.

ISSUE: Should references to uncharged prior crimes be avoided?

HOLDING: Yes

DISCUSSION: Branham argued that he should have been given a mistrial for the "prior bad acts" referenced by the detective. The Court agreed the "statement is particularly concerning because it references other bad acts identical to the one for which Branham was being tried." However, the "statement was isolated, unsolicited, and unresponsive to the Commonwealth's question." As such, the Court agreed that given the totality of the evidence, the statement was not so serious as to deny Branham a fair trial.

The Court upheld Branham's conviction.

Tackett v. Com., 445 S.W.3d 20 (Ky. 2014)

FACTS: In 2011, Tackett returned to the United States from Guatemala. He was arrested and charged with sex crimes against his son, Nicholas, then 20, and a female friend of his children, Sarah (then 18), that occurred in Carter County. The crimes had occurred approximately ten years before. At trial, Sarah testified to a rape, a sodomy and a sexual abuse that had occurred when she was about 7. Nicholas testified to instances of sexual abuse and sodomy that had occurred when he was 5-7 years old. In both cases, they told no one for some years, but eventually disclosed it to a forensic interviewer and law enforcement. During the testimony of the doctor who had worked with both children, the doctors had testified as to what both had said and both had identified

[26] Parker v. Com., 291 S.W.3d 647 (Ky. 2009); Davis v. Washington, 547 U.S. 813 (2006).

Tackett as the perpetrator. Tackett was convicted of some, but not all, of the alleged crimes and appealed.

ISSUE: Are physicians permitted to testify to hearsay identification of a perpetrator?

HOLDING: No

DISCUSSION: First, during the testimony of the doctors, although legally hearsay, Tackett did not object. The Court noted that "a physician is permitted to testify about statements made by a patient "for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis."[27] However, that does not "open the door to all testimony by physicians in all conversations with patients."[28] Specifically, the Court had "held that it is palpable error to permit a physician to testify about the identification of the perpetrator by a child victim of sexual abuse."[29] Although the Court agreed it was error, since Tackett had "explicitly stated that he had no objection to the admission of Dr. Hunt's report, which stated that Tackett was the perpetrator," the Court would not then allow the objection. (The Court addressed a similar issue with a doctor with respect to Sarah the same way.)

Tackett also argued that the Commonwealth introduced improper "prior bad acts" during testimony and through the prosecutor's statements. The Court noted that the prosecutor's statements were not evidence and that wide latitude was accorded during opening, and that although there may have been improper statements made, there was no objection raised at the time. With respect to statements made by Sarah in testimony, the Court noted that "any acts Sarah and Nicholas testified about – as long as they met the criteria for sexual abuse, rape, and sodomy – fell within the counts of the indictment" which was broadly defined.

Among other testimony objections, Tackett argued that Detective Carter "impermissibly bolstered Nicholas 's testimony: (1) Detective Carter testified about the investigative steps he took - watching Sarah's forensic interview, calling Nicholas's mother, setting up and watching the forensic interview of Nicholas at Hope's Place, obtaining an arrest warrant, and arresting Tackett; and (2) Detective Carter testified that "the family thought [Tackett] could have taken photos and things like that" so he seized Tackett's computer." Since Tackett did not object, however, and because the detective testified last, any "evidence about Sarah's and Nicholas's forensic interviews and Detective Carter's conversations with Nicholas and his mother had already been introduced without objection by Tackett." The error found no palpable error to warrant overturning the verdict.

> Specifically, Detective Carter testified that the information he received which motivated his investigation was from the forensic interview of Sarah and Nicholas, not from an unnamed informant. Nicholas and Sarah both testified and were subject to cross-examination, unlike the unnamed informant in Gordon.[30] Furthermore, in Gordon, the statement that Gordon was selling narcotics implied that Gordon had committed other crimes for which he was not charged. The testimony Tackett complains of in number one above goes only to the crimes

[27] KRE 803(4).
[28] Colvard v. Com., 309 S.W.3d 239 (Ky. 2010).
[29] Hoff v. Com., 394 S.W.3d 368 (Ky. 2011).
[30] Gordon v. Com., 916 S.W.2d 176 (Ky. 1995).

for which Tackett was charged, not to other potential uncharged crimes. Finally, while Detective Carter's testimony may have implicitly bolstered Nicholas's testimony, *e.g.* Detective Carter would not have undertaken his investigation if he did not believe to some extent Nicholas's allegations, that is true of most police investigations.

The Court upheld Tackett's convictions.

TRIAL PROCEDURE / EVIDENCE - PHOTOS

Garcia v. Com., 2014 WL 6882856 (Ky. App. 2014)

FACTS: Garcia and Staples (her boyfriend) were separately charged in the death of Garcia's five-month-old daughter, Angel, on counts of Murder and Criminal Abuse 1st. The child died of a brain injury, but there were also multiple injuries at varying stages of healing, dating from 30-60 days old. Garcia and Staples gave stories that did not match and in addition, Garcia gave several conflicting versions of what had occurred to several witnesses. Eventually, their stories coalesced, however. They were tried jointly and neither testified. Distinguishing between "who was the principal and who was the accomplice was debatable," and Garcia was convicted only of Manslaughter and Abuse 1st. She appealed.

ISSUE: To violate the Confrontation Clause, must statements incriminate the other party?

HOLDING: Yes

DISCUSSON: Garcia argued that statements admitted against Staples implicated her, and since he did not testify, she had no opportunity to cross-examine him, in violation of the Confrontation Clause. The Court noted, however, that "Staples never specified any incriminating details and never placed the blame on Garcia." The Court also disagreed with Garcia that the admission of the autopsy photos was impermissible, noting that under Ratliff v. Com., "an autopsy does not impermissibly alter a body's condition making such photos inadmissible."[31] The photos, selected and used to illustrate the testimony of the medical examiner, were allowed.

However, the Court agreed that an error in the jury instructions on the issue of complicity required that her conviction for Manslaughter be overturned, although the conviction for Criminal Abuse was allowed to stand.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Wade v. Com., 2014 WL 7238402 (Ky. 2014)

FACTS: Fuquay agreed to act as a CI, with Det. Ponder (Meade County SO), because he was facing his own trafficking charges. He arranged to meet Wade to buy cocaine with marked bills. He returned the cocaine to Ponder. Wade was not immediately arrested and when he was later found, and searched, he did not have the marked money. Later investigation indicated the $100 bill

[31] 194 S.W.3d 258 (Ky. 2006).

in question might be a nearby store, where a friend of Wade's had been asked to buy cigarettes, and it was in fact found there. During the trial, the store owner testified as to what he'd been by Det. Ponder about the situation.

Wade was convicted of trafficking and tampering with physical evidence (for promptly disposing of the bill). He appealed.

ISSUE: Is hearsay permitted when it simply describes details of what took place?

HOLDING: Yes (but see discussion)

DISCUSSION: Among other issues, Wade argued it was improper to allow the store owner, from whom the bill was recovered, to repeat what he'd been told by Det. Ponder. The Court looked at three alleged hearsay statements and concluded that the witness's repeating of what he'd been told "fits comfortably into the verbal acts construct." It was given "for the purpose of describing the relevant details of what took place."[32] She merely testified consistent with Det. Ponder.

Wade's convictions were upheld.

Weatherspoon v. Com., 2014 WL 7237929 (Ky. App. 2014)

FACTS: On February 27, 2010, a CI notified Det. Hendley (Pennyrile Narcotics Drug Task Force) that Weatherspoon would be transporting a "significant amount of cocaine" by vehicle through Hickman County. Information on the vehicle was relayed to other officers and her car was spotted shortly after midnight by Det. Hendley. Deputy Wyant (Hickman County SO) followed the vehicle, noting that the temporary registration tag was partially covered. He stopped the vehicle, finding Weatherspoon driving and her niece, Tina, age 15, in the passenger seat. Deputy Wyant learned that Weatherspoon was on parole in Missouri and lacked permission to be in Kentucky. Both were taken from the car and at some point, Weatherspoon consented to a search of the vehicle. Nothing was found initially. Some 20-30 minutes later a drug dog from another county arrived and alerted to the front passenger seat and console. When told the dog would sniff her as well, Tina confessed that she was holding a small amount of cocaine in her underwear for Weatherspoon.

Weatherspoon was indicted for Unlawful Transaction 1st, Trafficking 1st and PFO. At trial, Weatherspoon denied the cocaine found on Tina belonged to her or any knowledge of drugs in the vehicle. Tina testified as indicated above. Weatherspoon was convicted[33] and appealed.

ISSUE: May inadmissible hearsay be considered "harmless?"

HOLDING: Yes

[32] Brewer v. Com., 206 S.W.3d 343, 351-52 (Ky. 2006) (statements are not hearsay when they are admitted for the purpose of explaining one's actions rather than for proving the truth of the matter asserted so long as the actions taken are at issue in the case).

[33] She was convicted of Possession rather than Trafficking, however.

DISCUSSION: Among other issues, Weatherspoon argued that four "inadmissible hearsay statements" – by two witnesses – were allowed. Two involved Det. Hendley and Deputy Hopper, who both testified about the investigation was as the result of a confidential tip. The Court agreed that they were hearsay and provided "at least in part, to prove the truth of the matter asserted, i.e., that [she] was transporting drugs." The Court ruled the statements did not fall within the rule of Sanborn v. Com., which "held that hearsay statements may sometimes be admissible in order to explain the actions of police officials."[34] The Court noted that "such testimony would only be admissible if an issue concerning the actions of the officers was first raised." However, since the stop was predicated on another lawful reason, it did not actually prejudice Weatherspoon. Det. Hendley also mentioned Tina's confession, but the court found this to be cumulative of other evidence, including Tina's own testimony, so it too was harmless.

The Court also upheld the denial of a motion to suppress the evidence found on Tina's person. The Court agreed that the stop was lawful and noted that the complaint that the stop was unreasonably long (due to the wait for the dog) was "framed as such that she [was] complaining of Tina's continued detention, not her own." In fact, Weatherspoon was being detained for a possible parole violation which was "completely reasonable." The Court noted that she had no right to assert Tina's Fourth Amendment rights.

The Court upheld the conviction but did reverse the sentence for unrelated reasons.

Calloway v. Com., 2014 WL 5421256 (Ky. App. 2014)

FACTS: On September 11, 2014, Bryant was watching TV at his Logan County home when two men entered. The first, white, male wielded a baseball bat. Both had their faces covered and wore gloves. They took turns beating Bryant with the bat while the other searched for money and drugs. He said there were drugs in his van, outside, and the black male duct taped him and took him outside to look. There he was able to get loose and chased the two men from his home.

Bryant told investigators that he did not know the white male, but was "pretty sure" the black male was Lee (Calloway). Smith, a neighbor who saw the two men running from the home, identified Calloway as well, from a photo lineup. Calloway was convicted of a variety of charges, included Robbery 1st. He appealed.

ISSUE: May hearsay be admitted to refute allegations of later fabrication?

HOLDING: Yes

DISCUSSION: Among other issues, Calloway argued that Deputy Harvey and Det. Bibb (presumably Logan County SO) "impermissibly repeated hearsay statements of other witnesses." The court looked to their testimony, in which each repeated what a witness (Bryant and Smith) told them. Calloway argued that was hearsay and bolstering of the respective witnesses. The Court ruled that "the statements by the police officers in this case were admissible under KRE 801A(a)(2), which permits the admission of a prior consistent statement if it is 'offered to rebut an express or implied charge against the declarant of recent fabrication or improper motive.'" The Court noted that Bryant had been impeached on statements relating to how certain he was that the black male was

[34] 754 S.W.2d 534 (Ky. 1988).

Calloway and as such, evidence as to what Bryant told the officers was proper to rebut the allegations of "recent fabrication and uncertainty." With respect to the repeating of Smith's statement, however, the Court agreed that was error, because her credibility had not yet been attacked. However, because it was subsequently attacked, the Court agreed that although inadmissible at the time it was made, it did not prejudice the situation.

Calloway also argued that the introduction of "certain highly prejudicial text messages" through Det. Gibbs, was improper. The evidence indicated that the messages came to and from Calloway, through a phone number associated with him and which was in the jail's possession following his arrest. Once that foundation was laid, it was up to the jury to believe or disbelieve that he'd written the messages. The Court agreed they were not hearsay because they were Calloway's own messages. The messages received by Calloway were not hearsay because they were not offered to prove the truth of any matter asserted by the message – in effect, they were commands (to come outside and to call).

The Court affirmed his conviction.

Greer v. Com., 2014 WL 5410301 (Ky. 2014)

FACTS: Darryl and Carrie Dominque went to Greer's home, in Marshall County, to "socialize and drink." At some point, Carrie left briefly, and when she returned Darryl and Greer "were scuffling on the floor." The fight ended when she intervened and they went to their vehicle. Greer picked up and fired a shotgun twice, killing Darryl.

During the trial, Det. Melone was permitted to testify to the effect that Carrie's version of the incident "was consistent with, and was corroborated by, other evidence."

Greer was convicted of murder and appealed.

ISSUE: May testimony on irrelevant (and damaging) information potentially cause a case to be overturned?

HOLDING: Yes

DISCUSSION: Greer argued that it was improper to admit the testimony from Det. Melone. He'd also stated that Greer's testimony was "typical of the sort of testimony given by dishonest persons," and that narcotics officers investigated the shooting. The Court agreed the statements were improper and addressed each in turn.

First., although it was improper, the first two pieces of testimony did not substantially affect the possibility that it affected the outcome of the case. With respect to the mention of narcotics detectives, there was no mention of drugs actually being found in the murder trial. (In fact, there were, but those charges were handled separately as they were not relevant to the murder.) Since the mention was "isolated and fleeting," the Court found it did not affect the trial in an substantial way, either.

Finally, although he admitted to having been drinking that day, there was no evidence that it affected his faculties. As such, there was no indication that he was so intoxicated so as to have been unable

"to form the intent to commit murder." For that reason, the Court agreed that he was not entitled to a voluntary intoxication instruction.

Greer's conviction was upheld.

Bessinger / Carter v. Com., 2014 WL 7204388 (Ky. App. 2014)

FACTS: Bessinger was stopped on October 8, 2012 for DUI, by Officer Fields (Bowling Green PD). It was undisputed that it was recorded, as indicated on the citation. He was found to be under the influence of Oxycodone. On November 16, 2012, Carter was stopped by Officer Carroll (Bowling Green PD) for failing to wear a seat belt. He was ultimately found to be under the influence of alcohol, with a Intox of 0.152. Both requested copies of the in-car recordings and it was revealed that a "permanent server failure" had occurred at BGPD. As such, both Bessinger and Carter argued that the evidence of any statements made during the stop should be suppressed, given the lack of the video. The trial court noted that RCr 7.26 mandated the video be produced. The Commonwealth appealed to the Circuit Court, which reversed the granting of the motion to suppress. That court distinguished Sanborn v. Com., in that in that case, the destruction was intentional. In this case, neither the Commonwealth or the BGPD intentionally destroyed the evidence.

At best, the missing evidence case law and instruction would not apply when the loss was from mere negligence or a technical, unintentional failure. Carter and Bessinger appealed.

ISSUE: Does a missing evidence instruction require proof of bad faith?

HOLDING: Yes

DISCUSSION: The Court looked at the rule in question and agreed that Sanborn did not require suppression of the evidence. As such, that ruling was upheld. With respect to whether a missing evidence jury instruction was required, the Court noted that there was no evidence of bad faith in the unavailability of the evidence. As such, it noted that the pair, should they now go to trial, would have the chance to argue that point in the trial court.

The Court affirmed the Circuit Court's decision.

EMPLOYMENT – DISCIPLINE

Pearce v. University of Louisville / Hill v. City of Mt Washington, 448 S.W.3d 746 (Ky. 2014)

FACTS: Pearce was terminated from the ULPD "after [it was] determined that [he] had violated University and departmental policies on two separate occasions." Hill was "temporarily suspended and reduced in rank" following a determination that he had been insubordinate. In both, there was no formal external complaint, only complaints generated from within. Both requested the administrative review process provided by KRS 15.520. Hill was denied outright, while Pearce was denied the right to have an attorney present as allowed by the statute. Both appealed through the courts and both were denied, albeit for different reasons. Each appealed to the Kentucky Court of Appeals, arguing that they were entitled to the protections of KRS 15.520.

In Pearce, the Court agreed that the statutes applies only when a complaint was initiated externally, by a citizen; Hill, decided later, simply followed Pearce. Both appealed to the Kentucky Supreme Court.

ISSUE: Does 15.520 apply to internally-generated complaints?

HOLDING: Yes

DISCUSSION: The Court discussed at length the principles of statutory construction, and that any interpretation is to be reviewed de novo by the Supreme Court. In doing so, the Court's primary and most fundamental objective "is to determine the legislature's intent in enacting the legislation." To do so, it is necessary to "look first to the language of the statute, giving the words their plain and ordinary meaning." When that language is ambiguous, it must look to other places to determine the meaning, including legislative history and public policy.

To that end, the Court looked at the language of the preamble of KRS 15.520, in which, albeit somewhat awkwardly, the legislature indicated it was "establishing a baseline system for the investigation and hearing of complaints against police officers." Although citizens are mentioned, the Court disagreed that the legislature intended to provide such due process only with citizen's complaints. Nothing explicitly limited such rights when a complaint was internal, rather than external, although to do so would have been a simple matter. The Court noted that the word citizen would encompass, for example, the police chiefs and supervisors and noted that perhaps, civilian, might have been the more appropriate word choice.

The Court noted that "[t]he dichotomy of a 'citizen's complaint' vs. an intra-departmental complaint is wholly a creation of the lower courts rather than the legislature," and that the lower courts "ignor[ed] essential words," failing to read the entire statute as a whole. In fact, the Court noted, by the lower court's reading, non-citizens of the Commonwealth (including tourists and non-resident students) would not be able to use the provisions of the statute, which the Court found to be an unlikely and even absurd conclusion. The Court found "no legislative intention to differentiate the administrative due process rights available in either kind of administrative hearing" nor any limitation that it was not to apply to "*any* complaint taken from *any* individual," including other members of the department.

The Court also reflected back to KRS 15.410, which correlates with KRS 15.520, and notes that the latter "directly references and incorporates" the former, linking the protections to officers who work for local units of government and do receive KLEPF. The Court noted that other statutes[35] provided for "somewhat different disciplinary procedures for municipal employees," but stated that "because KRS 15.520 is both the more specific and later-enacted statute, its provisions supersede and supplant any conflicting provisions (and the proposition that there even are any conflicts is much in doubt) contained in these widely dispersed statutes. The Court noted that the possible conflicts mentioned "are actually *not* conflicts at all." The Court noted that the "legislature is presumed to be aware of existing laws when enacting a new statute."[36] As such, if the legislature "intended to provide differing procedural protections for police officers … it could have easily done so."

[35] KRS 90, 95, 83A, 70 and 164.
[36] St. Clair v. Com., 140 S.W.3d 510 (Ky. 2004).

In conclusion, the Court reversed the lower court decisions in both cases and remanded each for further proceedings.

Ferriell v. City of Audubon Park, 2014 WL 6882309 (Ky. App. 2014)

FACTS: Ferriell worked for the Audubon Park PD for approximately 4 years, through October 2010. In late July / early August, 2010, he "reported a violation of federal law" to the agency He claimed that he "was subjected to different terms and conditions of his employment" as a result, and was "ultimately terminated on October 6, 2010." He filed a complaint under the Kentucky Whistleblower Act, KRS 61.101 et seq. The City claimed it was not an employer under the definition of the statute, and the trial court, looking to Wilson v. City of Central City,[37] concluded that the police department (and the city) were not employers within the meaning of KRS 61.102. Ferriell appealed.

ISSUE: Does the Whistleblower Act apply to cities?

HOLDING: No

DISCUSSION: Looking to the same case, the Court agreed that cities are not covered under the Kentucky Whistleblower Act, since they are neither the Commonwealth of Kentucky nor "any of its political subdivisions (counties)." In a strange twist, firefighter are "specifically named agents of the Commonwealth per KRS 75.070(1)" – but that is not the case for police officers of cities.

The Court affirmed the decision of the trial court.

Cochran / Maupin v. O'Donnell (Madison County Sheriff), 2014 WL 5510787 **(Ky. App. 2014)**

FACTS: In 2006, Cochran (the son of the sitting sheriff at the time) and Maupin were employed as deputy sheriffs in Madison County. In that year, O'Donnell defeated Sheriff Cochran in the primary and went on to win the General Election. Both Maupin and Cochran supported O'Donnell's opponent in the general election. In late December, 2006, both men were terminated by O'Donnell. They filed suit in federal court, it was dismissed, they then filed suit in state court.

Cochran and Maupin raised several statutes to argue that termination due to political activity was improper under state law. However, the state court ruled that the statutes under which they claimed did not apply to them and that they failed to state a claim. Cochran and Maupin appealed.

ISSUE: Does KRS 70.267 apply only to sheriff's offices with merit boards?

HOLDING: Yes

DISCUSSION: The Court noted that as a rule, Kentucky employment is "at-will" absent specific protections. The Court noted that KRS 70.267 applies only to deputies that are under a deputy sheriff merit board, which Madison County lacks. The two men also cited to KRS 67C – which applies only to Metro Louisville and its local police force merit system. Likewise, other

[37] 372 S.W.3d 863 (Ky. 2012)

citations to various statutes, including county police, firefighters and city police, did not apply for the same reason. Furthermore, the Kentucky Constitution provides no protection, either.

The Court upheld the dismissal of the action.

CIVIL LITIGATION

Gaither v. Justice and Public Safety Cabinet, 447 S.W.3d 628 (Ky. 2014)

FACTS: Gaither, a 17 year-old-high school student, was recruited to be a drug informant for KSP. Gaither had gotten into trouble at school for a non-drug-related offense and agreed to be a CI in exchange for minimizing his punishment and to earn money. At that time, they had no agreement with his guardian, which violated KSP's protocol. When he turned 18, he began to work under Det. Burton, making controlled buys. He made several recorded buys over six months and earned over $3,000. He was then taken before grand juries in Marion and Taylor to testify.

At each of these appearances, KSP "made no effort to conceal the fact that they were taking Gaither to appear as a witness for the Commonwealth." He was openly escorted by officers and walked through "crowded public corridors" full of local criminal defendants. Gaither was a large and distinctive young man. They had decided to present him to get sworn testimony on record to avoid a later recantation. One of the cases involved Noel, who, it turned out, was acquainted with one of the grand jurors, who informed Noel about Gaither's testimony.

The next day, Dets. Burton, Simpson and Antle decided to use Gaither in a buy/bust against Noel. Gaither, fitted with a recording device, met Noel in Campbellsville. He was told not to get into the car and given code words to use if he was in danger. However, things immediately went wrong, with Gaither getting into the car and the pair driving away. Not hearing the code word, they elected to follow the car, but lost visual and radio contact. They scoured the area for some time, finally putting out an alert. Late that night, other officers founded Noel, who eventually confessed that Gaither had been taken to Casey County, tortured and killed.

Gaither's estate filed a wrongful death claim against KSP, invoking the Board of Claims. The Estate alleged that the troopers were negligent in their performance of a ministerial duty, to which the Board agreed, awarding the estate over $168,0000. KSP appealed, and the Franklin Circuit Court reversed, holding that they were performing discretionary acts and protected by sovereign immunity. The Estate appealed to the Kentucky Court of Appeals, which upheld the lower court. The Estate further appealed to the Kentucky Supreme Court.

ISSUE: Does the negligent performance of a ministerial act remove immunity for a state officer?

HOLDING: Yes

DISCUSSION: The Court noted that the Board of Claims provided for a limited waiver of immunity in claims of negligent performance of ministerial acts. The Court agreed that the troopers were working within their roles as state officers.

The court discussed the difference between ministerial acts, for which immunity is waived, and discretionary acts, for which it is not waived. The former "requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." Discretionary acts are "those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment."

The Court agreed that several of the actions, such as the decision to have Gaither testify and taking him through the courthouse, were discretionary. Further, although the delivery of Gaither to the grand jury was ministerial, ultimately, that action did not result in his death and had no causal connection. The decision not to intervene "required the exercise of critical judgment" – which made it discretionary as well. However, the Court noted that the using a CI after that CI has been "burned" – and his identity compromised – violated a clear standard of police work and was ministerial. Even though KSP did not have a directive to that effect, that duty flowed "from common law duties or professional customs and practices." As such, that act involved the negligent performance of a ministerial act.

The Court rejected KSP's argument that they owed no special duty to protect Gaither, noting that his injury in this case "was uniquely foreseeable." "By seeking out his help, offering to pay him, and to oversee him work, the KSP created a relationship of trust with him." Gaither "had a right to expect the benefit of their watchful eye and keen attention to his protection." It was foreseeable that a drug trafficker would retaliate against an informant, up to an including murder.

The Court reversed the lower courts and reinstated the award, albeit lowering it to $148,787.

SIXTH CIRCUIT

ARMED CAREER CRIMINAL ACT

U.S. v. Jenkins, 770 F.3d 507 (6th Cir. 2014)

FACTS: In 1990, Jenkins was convicted in Kentucky for nine burglaries of residences. He claimed it occurred over one day but the state claimed it took place over four days. When he pled guilty in 2012 to being in possession of a firearm, he argued that the previous crimes should be treated as one, for purposes of enhanced sentencing under the Armed Career Criminal Act (ACCA) - 19 U.S.C. 924(c) – the government argued that they were nine separate crimes. The Court agreed and sentenced him under the ACCA and Jenkins appealed.

ISSUE: Are burglary convictions counted as separate for the ACCA?

HOLDING: Yes

DISCUSSION: The ACCA enhances penalties for anyone convicted of three or more violent felonies that occurred on occasions different from each other. Normally, figuring that out is simply, but sometimes, it is not. In this case "unhappily for Jenkins, these questions do not help his cause." The Court agreed that each burglary "began when he broke in and ended when he left with the stolen goods." At any point during the string of burglaries, he could have stopped, but did not.

The Court affirmed the sentencing enhancement.

U.S. v. Moore, 580 Fed.Appx. 452 (6th Cir. 2014)

FACTS: In 2013, Dyer County (TN) deputy sheriffs stopped a minivan being driven by Moore. He had no OL, his having been revoked for DWI. He had methamphetamine on his person and admitted to a pistol in the car as well, in a hidden compartment behind the seat. He indicated there was a shotgun that was inoperable. The officers found both weapons along with other evidence.

Moore was charged with possession of a firearm as a felon, as well as possession of an illegally altered firearm, as the shotgun had a shortened barrel. He was convicted of drug trafficking and given an enhanced sentence, because of the firearm. He appealed.

ISSUE: Does the presence of a firearm in a vehicle enhance the penalty for a federal drug trafficking conviction?

HOLDING: Yes

DISCUSSION: Moore argued that the enhancement should not apply because the "firearm's proximity to him was merely coincidental and was not associated with his admitted drug trafficking." However, testimony indicated it was accessible to the driver, far more accessible than in a trunk, for which the enhancement had been applied in the past.

The Court affirmed the enhancement.

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Patterson / Majors, 2014 WL 5204944 (6th Cir. 2014)

FACTS: In late 2004, Majors and Cleo Patterson (a relative of the defendant, Adrian Patterson) were stopped for a traffic offense. In the course of the stop, 26 kilos of cocaine were found hidden in the vehicle. Both were arrested. In 2006, Adrian Patterson was identified as a buyer in a transaction that spanned California and Tennessee. As a result, DEA agents began surveillance of 2211 Ladd Drive, in Clarksville, with the help of the Clarksville PD. Anderson (of the PD) obtained a search warrant for the house and Patterson was there at the time. A kilo of cocaine, over $300K in cash and the truck involved in the traffic stop were seized. Two months later, they searched Patterson's residence and a Ford SUV was seized. In 2009, Patterson and Majors were arrested on drug conspiracy charges.

Patterson moved to suppress the Ladd search, which was denied. He then moved to suppress the evidence from the other search – that too was denied. Both Majors and Patterson were convicted and appealed.

ISSUE: May oral testimony be used to supplement a search warrant affidavit?

HOLDING: Yes (not but recommended)

DISCUSSION: The Court first looked to the Ladd search, which was based on an arguably insufficient warrant. Although Anderson's corroboration of an anonymous tip was "admittedly minimal," it was still enough for the officer to rely upon the warrant he later obtained. The officer supplemented the affidavit with oral information about a federal wiretap, as well. Patterson pointed to a discrepancy between Anderson's initial affidavit and his follow-up report on the search, concerning whether cocaine was expected to be at the home at the time of the search. In a later hearing, Anderson testified about the discrepancy to the satisfaction of the court. The Court agreed that Leon[38] applied.

Patterson's conviction was affirmed.

U.S. v. Miller, 2014 WL 5462310 (6th Cir. 2014)

FACTS: Miller did business in Ohio as a specialty pharmacy, carrying drugs not carried by other pharmacies. In 2008, the FBI and the Dept. of Health and Human Services (DHHS) joined with Ohio in investigating over-billing allegations by the pharmacy with respect to a particular drug. Special Agent Unkefer (DHHS) obtained a search warrant for the pharmacy, based on "several examples of fraudulent billing" involving the drug – deducing that based on a comparison between patient records to reimbursement records. Authority was given to search for specific patient files but many were found to be missing at the time of the search. They made another attempt a few months later by an administrative health care subpoena and obtained 21 files, but 90 were still missing. In December 2009, Miller's housekeeper told Agent Holmes (FBI) that she had found a garbage bag of patient files. She was instructed to check for certain names and reported back that some of them matched. Agents applied for a search warrant based on the above, but did not mention that she was asked to verify certain names. A warrant was issued and the files located.

Miller (and co-defendants) moved to suppress the evidence. Miller suggested that when they searched, initially, they actually crossed over into an adjacent building. The agent noted he thought the space was bigger than expected, but that they had no idea it was possible to get into the other building. Regarding the building search, she argued that the housekeeper became a government agent when asked to check. The trial court denied the motion to suppress and Miller appealed.

ISSUE: May an inadvertent entering into an area not covered by the search warrant be excused?

HOLDING: Yes

DISCUSSION: Miller argued that they went beyond the search warrant's scope when they entered her two adjacent pharmacy businesses – locations that are contiguous and accessible. The Agent indicated they entered only through the doors listed as belonging to the area to be searched, and that they were able to freely move between the floors and that they were unaware they were in the second floor of a different building. The Court agreed that even if they did so, they did so in good faith and without an awareness that they were leaving the confines of the search.

[38] U.S. v. Leon, 468 U.S. 897 (1984)

The Court affirmed the denial of the suppression.

SEARCH & SEIZURE – EXIGENT CIRCUMSTANCES

U.S. v. Fugate, 2014 WL 7182534 (6th Cir. 2014)

FACTS: On November 14, 2009, a Dayton convenience store was robbed by a masked person. He fled in a black Cadillac and was pursued by citizens, who maintained the vehicle in sight while communicating with 911. They stopped when the driver began to shoot, however. Officer Saylors went in pursuit and spotted a car circling in a small area, but apparently lost it. He kept searching. Eventually he spotted the top of a black car parked behind a fence, near an adjacent parking pad. Finding it odd that the car was in the yard rather than on the pad, he moved into the backyard and saw that it matched the description of the suspect car. There was cash in the car and the driver's door was open. Other incriminating items were nearby.

Saylors called for backup, which arrived quickly. A K-9 followed the money trail to the front. Checking a plate found in the car, they connected it to Fugate. They knocked at both doors and received no answer, at the house, but believed someone was inside. Saylors and another officer climbed through an open window and found Fugate. They arrested him and did a sweep, spotting additional items linking him to the robbery. They did not seize the items, instead, getting a search warrant.

Fugate was charged with numerous federal crimes. He moved to suppress, arguing that everything found as a result of Saylors' entry in to the back yard must be suppressed. The trial court ruled that the back yard was the curtilage and that Saylors' entry was not justified.

The Government appealed, and the Court affirmed that the entry was a violation. However, it remanded it back to determine if the good faith justified his entry into the yard. The trial court then determined that it did, in fact. Fugate took a conditional guilty plea to several of the charges and appealed.

ISSUE: May an officer enter a curtilage under exigent circumstances?

HOLDING: Yes

DISCUSSION: The Court agreed that the officer's entry into the yard was in good faith. He found the car within minutes of the citizen chase ending and they were actively in search of the getaway car. The "gravity of the underlying offense and the continuing danger to the local community are factors to be considered."[39]

The decision of the trial court was affirmed.

[39] Welsh v. Wisconsin, 466 U.S. 740 (1984).

SEARCH & SEIZURE – PROBATIONER

U.S. v. Payne, 2014 WL 5421227 (6th Cir. 2014)

FACTS: Ratleff was on "post release control." She claimed to be living with her mother, and agreed to inform her parole officer of any change in her residence. She also agreed that any place she lived would be subject to search. Det. Comstock, Bellefontaine PD, was investigating drug trafficking at a home on Powers Street and observed Ratleff coming and going from that residence and driving vehicles connected with the house. He knew Ratleff was on parole. He learned through the owner of the house that it was being rented by Ratleff and Payne. He informed Officer Niekamp, the parole officer, of what he'd learned and the parole officer tried to reach Ratleff at her mother's home. Her mother explained that she "sometimes stayed with Payne." Officer Niekamp, however, believed that Ratleff did not, in fact, live with her mother.

While on surveillance at the Powers Street residence, the two saw a car registered to Payne that Ratleff had been seen driving. The approached and met Ratleff on the sidewalk. Officer Niekamp challenged her residency status and he told her that he needed to go inside the house. As they entered, they saw Payne rolling a joint, and he was handcuffed. Officer Niekamp conducted a parole search, finding controlled substances and a firearm. Payne, was arrested and stated that Ratleff knew nothing about the gun and the drugs.

Payne later moved for suppression which was denied. He took a conditional guilty plea and appealed.

ISSUE: Are probationers subject to search for legitimate, probation-related issues?

HOLDING: Yes

DISCUSSION: The Court discussed the validity of the search. The court noted that those on parole or probation had given up some rights by their status and that some searches are justified. The Court agreed that the parole officer could not merely be acting as the "stalking horse" for a police investigation, however. [40] In this case, Ratleff was covered by an agreement to allow a search of her residence and certainly Officer Niekamp had at least reasonable suspicion that she was living on Powers Street.

As such, the search (and the items found) was lawful, and the Court upheld Payne's plea.

SEARCH & SEIZURE – TERRY

U.S. v. Mundy, 2014 WL 5839756 (6th Cir. 2014)

FACTS: On April 18, 2013, Dets. Lain and Tudor, were patrolling in an unmarked vehicle. They spotted a vehicle parked with legs sticking out from the back seat, so they stopped to investigate. As they approached, they realized that there were two people in the front seat and Mundy lying in the back seat with his legs protruding. Det. Tudor recognized Mundy and identified him as a trafficker. He sat up and the officers saw a digital scale near his feet.

[40] U.S. v. Knights, 534 U.S. 112 (2001).

After additional officers arrived, they received consent to search from Mundy and the car owner. They seized cocaine, cash and a scale. Mundy waived his rights and gave inculpatory statements. Mundy was charged with intent to distribute. He moved to suppress and was denied. He then took a conditional guilty plea, and appealed.

ISSUE: May officers initiate an encounter based on reasonable suspicion?

HOLDING: Yes

DISCUSSION: The Court agreed that the officers had reasonable suspicion to initiate the encounter, which wasn't even a stop, in fact. His position in the car suggested a possible break-in, which justified further talk with him, as well. The Court upheld the initial encounter, which then justified the remaining actions by the officers.

The Court upheld Mundy's plea.

U.S. v. Pettis, 2014 WL 6601028 (6th Cir. 2014)

FACTS: On November 14, 2011, at about 3:17 a.m., Toledo dispatch reported a burglary in a trailer park. A man called "Drift" – known to officers, had broken in and was assaulting a woman. Just a minute before, Officer Emery had seen a vehicle idling at the entrance to the trailer park, but did not see anything suspicious about it. However, with the report, he put out a description of the vehicle and stating that it might have some connection to the burglary. He and Officer Espinoza responded to the location. The victim explained that Drift had a pickup, but she hadn't seen the vehicle he was actually in.

Officers Zielinski and Holmes heard the radio traffic and went to the area where Drift was known to live. They came upon a silver Concorde and fell behind it until it stopped on its own. They approached the vehicle and questioned Pettis, the passenger, who failed to produce any ID. Learning that the driver had a CCDW permit and there was a gun behind the passenger seat, Zielinski had Pettis get out for a frisk. He found a handgun and placed him under arrest – as he was a convicted felon.

Pettis was charged under federal law for the weapon and moved to suppress, arguing the officers had no right to frisk him. The trial court denied the motion. Pettis took a conditional guilty plea and appealed.

ISSUE: Is an on-foot approach to a vehicle a "stop"?

HOLDING: No

DISCUSSION: The Court noted that both parties' agreed that the officers took no action to initiate a stop and that it stopped on its own, having reached its destination. Until Pettis was ordered out, the encounter was consensual. He argued he would not have felt free to do so. The Court noted the vehicle was not blocked in; the officers were parked behind it. They approached the vehicle on foot, with one officer on each side, nor did they engage in any "coercive or intimidating behavior." They did not draw weapons or raise their voices. Since he did not challenge

that they was reasonable suspicion that he was armed at the time they asked him to get out, the Court did not address that issue.

The plea was upheld.

U.S. v. Gaskin, 587 Fed.Appx. 290 (6th Cir. 2014)

FACTS: Around 8:30 p.m., on August 6, 2010, Lewis drove Gaskin, Hopkins and Hodge on a trip. The males were members of the "Hustle Boys," a gang, and the females involved were drug mules. The group was generally involving in running drugs and guns. On that evening, Trooper Lewis (Ohio Highway Patrol) observed the vehicle being driven without headlights, although it was after sunset. Lewis turned on the lights as she was pulled over. Trooper Mikesh arrived with her drug dog, which alerted on the car. Hopkins, a female minor, gave a false ID and admitted to having been smoking marijuana. During a frisk, the trooper detected a "hard object protruding from her groin," later determined to have been 602 OxyContin pills. Lewis was secured in the cruiser and while there, "removed a condom containing [437 OxyContin] from her groin area and hid it behind the cruiser's backseat." Gaskin was later arrested and found with 35 oxymorphone pills – and was also charged with offenses related to the pills in Lewis's possession. Denied a suppression motion, Gaskin was convicted and appealed.

ISSUE: Does a reasonable mistake as to the reason for a stop negate the stop?

HOLDING: No (but see discussion)

DISCUSSION: Gaskin argued that the stop was unlawful, and that the sun had not yet set. Evidence at trial, however, indicated that the local topography, a valley, may have affected the lighting at the scene – and that it was reasonable for the troopers to believe the lights should have been on. A mistake, if any, was reasonable – and all that was required was a reasonable belief in the validity of the stop.

Gaskin also argued that the failure to produce a video of the stop violated Brady v. Maryland.[41] During the stop, apparently, the DVR system in Lewis's vehicle "appeared to be working, but his memory card malfunctioned, was full, or otherwise failed to save the recording." He only discovered that when he tried to watch the recording himself. He was issued a new memory card and the old was apparently disposed of by their network administrator. Mikesh, who had a VHS system, was able to produce her recording, although it was faulty in spots. Finding no reason to rule that the unavailability of Lewis's recording was done in bad faith, the Court agreed that it did not violate Brady.

The Court also agreed that the evidence was sufficient to prove that Lewis possessed the pills to distribute them, given the number he possessed and that his "entire livelihood was financed and premised on distributing controlled substances."

The court upheld his convictions.

[41] 373 U.S. 83 (1963).

42 U.S.C. §1983 – DETENTION

Snyder v. Kohl's Department Store, 580 Fed.Appx. 458 (6th Cir. 2014)

FACTS: On March 1, 2012, Snyder was seized by a Kohl's store security officer for shoplifting, but ultimately found to have not done so. She sued a police officer who responded to take the arrest, Georgetown and the store. The claims against Georgetown and the officer were settled separately but the federal court kept jurisdiction to handle the state law claims under 28 U.S.C. §1367.

The District Court gave summary judgment to Kohl's under the "shopkeeper's privilege" – KRS 433.236. Snyder appealed.

ISSUE: Is it false imprisonment to detain a suspected shoplifter?

HOLDING: No (but see discussion)

DISCUSSION: The Court noted that a retailer is not liable for false imprisonment under Kentucky law, when detaining a suspected shoplifter, "if three requirements are met: (1) the employee has 'probable cause' to believe the individual is shoplifting; (2) the person is detained 'in a reasonable manner for a reasonable length of time'; and (3) the detention is effected for one of five legitimate purposes, such as making reasonable inquiry into whether the person has unpurchased merchandise, recovering those goods, or informing law enforcement of the detention of the purpose." To affirm the district court, the Court looked to whether Kohl's had sufficient evidence to prove each of these. The Court found that Kohl's did not and reversed the summary judgment in its favor.

42 U.S.C. §1983 - ARREST

Snyder v. U.S., 2014 WL 5437999 (6th Cir. 2014)

FACTS: On April 17, 2012, Snyder was arrested "in a bizarre case of mistaken identity." Several months earlier, in December, 2011, the Safe Streets Task Force in Cincinnati was working drug trafficking cases in the area. Special Agent Giordano (FBI) and Officer O'Brien (CPD) were both members. Agent Giordano learned from a CI that a woman named Stephanie Snyder and her mother were selling Oxy – and noted the mother's first name might be JoAnn. He did an online search and returned one result, the Plaintiff. The CI could not positively identify Snyder, noting that she "could be" – and that the OL picture might be from before her "extensive drug use." They were unable to made an ID from a controlled buy made from Stephanie Snyder. At some point, they gave up the investigation and the information was handed over to Officer O'Brien.

On April 16, 2012, Officer O'Brien sought an arrest warrant for JoAnn Snyder, basing it on the above information. She was arrested the next day. Before the end of the month, the grand jury declined to indict. She spent several months getting the charges dropped completely and her record expunged.

Snyder filed suit against all of the involved officers and agencies, under 42 U.S.C. §1983. The claims were dismissed and Snyder appealed.

ISSUE: Is a false arrest based on minimal information necessarily a civil rights violation?

HOLDING: No

DISCUSSION: Among other claims, Snyder argued that she'd been falsely arrested by Officer O'Brien. The Court agreed that although O'Brien did not double-check or verify the accuracy of the information he received from the FBI, that was at most, negligence and did not rise to a constitutional violation. As such, he was entitled to qualified immunity.

The court affirmed the dismissal of the claim.

42 U.S.C. §1983 – FORCE

Standifer v. Lacon / City of Franklin (OH), 2014 WL 5286618 (6th Cir. 2014)

FACTS: On May 7, 2010, "Standifer needed help." When she began to hallucinate about "seeing blood everywhere," her mother called for police. She went into a "flat rage" and resisted; one officer handcuffed her and held her wrists to take her to the hospital. As they walked out, "she kicked him in the groin and ended up on the ground." The officer said she fell, but she claimed to have been "taken down." She fractured her neck in the process.

Standifer filed suit and the District Court awarded summary judgment to the defendant officer and city. Standifer appealed.

ISSUE: Is handcuffing a mentally unstable subject proper?

HOLDING: Yes

DISCUSSION: Standifer argued that "being handcuffed to go to the hospital was excessive force." The Court, however, found it "objectively reasonable" for the officer to do so, as a "safety precaution." The Court agreed that Officer Lacon had a valid reason to believe that Standifer was a risk to herself, and to others, by her behavior. Further, her injury did not result from the handcuffs and she alleged no injury from the handcuffs. Any bruising from being held "too tightly" was to be expected from her twisting and turning in his grip.

Finally, with respect to her actual injury, the trial court had looked at dash cam video and found that she simply lost her balance. The Court did not find the video to be so unequivocal and noted that a reasonable jury could accept either side's version. However, even if she was pushed to the ground, the Court noted that it was still necessary to find that was unreasonable – and at most, the officer "guided her down by pulling her arms up and pushing the rest of her body down – a reasonable response after being kicked in the groin." He did not "slam, shove, or throw" her to the ground. He knew what had occurred previously and made a decision to take her to the ground.

Here, she had already knowingly caused harm to the officer and was obstructing his attempt to take her into custody. Although the Court agreed that her injury was unfortunate, "not all unfortunate events involving the police are constitutional violations." The Court affirmed the summary judgment.

Cass v. City of Dayton, 770 F.3d 368 (6th Cir. 2014)

FACTS: On May 16, 2008, Det. Mullins (Dayton PD) made a buy-bust using information from a CI. The CI had ordered an ounce of cocaine from Moore, a known armed drug dealer. They were to start with a traffic stop, during which Moore would be arrested. If that didn't work, the detective would take the CI to the motel where the cocaine would be exchanged and he would be arrested there. When the traffic stop plan failed, they moved on to the second location.

Moore was observed arriving in a Taurus, with multiple other occupants. He made contact with the CI and the deal was made, with the CI giving the signal. The Ci moved into the hotel, leaving Moore to wait for the end of the exchange. However, Moore elected to drive off, not giving the officers a chance to move in on him, as planned. Det. House partially blocked the exit and walked toward the Taurus. Other officers moved in as well. Det. House was wearing a visible badge and a police vest and had his gun drawn, ordering the occupants to stop. Det. St. Clair did as well. The driver, Stargell, accelerated and House was struck and thrown as he rolled across the hood. St. Clair was struck in the hand and his gun discharged. House misunderstood what had happened and thought St. Clair had fired intentionally, in response to a threat.

House then shot at the driver, thinking he was protecting the other officers and civilians. In fact, he struck and killed Jordan, the front-seat passenger. Eventually, the vehicle crashed. House and St. Clair were both charged with violating the city's firearms policy and House's failure to not stay out from in the front of a moving car.

Cass, Jordan's administrator, filed suit against House and other government defendants. House moved for summary judgment to all government defendants, finding that House's use of force was not objectively unreasonable. Cass appealed.

ISSUE: Does violation of a policy automatically lead to liability?

HOLDING: No

DISCUSSION: The Court noted that Jordan was not the intended target, and the case was properly assessed under the Fourth Amendment framework. As a general rule, an officer could not use deadly force against a vehicle moving away, but they "may continue to fire at a fleeing vehicle even when no one is in the vehicle's direct path when 'the officer's prior interactions with the driver suggest that the driver will continue to endanger others with his car.'[42] Cognizant that the ultimate question in such cases is "objective reasonableness," the Court agreed that House did not use excessive force. Despite his display of authority as an officer, the driver accelerated. House heard St. Clair fire and reasonably believed that other officers in the area were at risk. He had already been struck by the car, as well. He knew that Stargell had shown that he was willing to injure an officer in trying to get away.

[42] Smith v. Freland, 954 F.2d 343 (6th Cir. 1992).

Looking at the situation in "real time," the Court agreed that Stargell was posing a continuing risk, and that "no reasonable officer would say that the night's period had ended at" the point that he was clear of the officers.

With respect to the policy, the Court noted that the Supreme Court "has been cautious to draw a distinction between behavior that violates a statutory or constitutional right and behavior that violates an administrative procedure of the agency for which the officials work."[43] The Court agreed that what the officer did was objectively reasonable under the circumstances.

The Court affirmed the district's court's summary judgment.

Sweat v. Shelton, 2014 WL 7139484 (6th Cir. 2014)

FACTS: On March 12, 2010, someone broke in Marion's Nashville home. He called 911. Officer Shelton responded, along with his K-9, Memphis. They went to where the suspect was last seen and Memphis was deployed on a long-lead to search. Memphis ran under the deck of a nearby home. The officer heard sounds underneath and order Memphis to apprehend – a command which ordered him to bite. The officer later noted that Wallace, the man Memphis located, did not react as most suspects did to the dog. Wallace and the dog moved out of Shelton's view, still under the deck but around a corner. Shelton ran around the house and looked under the deck, and "saw Wallace put his hand into the right pocket of his pants while attempting to crawl out from underneath the deck." He drew his pistol and gave commands, which Wallace ignored. Ultimately he brought his hand out and Shelton holstered his weapon, still commanding him to quit resisting. Wallace began to kick at Memphis and tried to escape. Shelton and Wallace struggled; Wallace put his hand back into his pocket. Shelton trapped Wallace's hand in the pocket and he felt a hard, squarish object. Still fighting, Shelton elected to try to get some distance, so he spun off and pushed off from Wallace. He then drew and fired, three times; Wallace died that same day. The item in his pocket turned out to be a stolen Ipod.

Wallace's estate filed suit. Although most claims were dismissed, the court refused to dismiss the case against Shelton, finding his use of force did not appear to be reasonable. Shelton appealed.

ISSUE: Is a decision on whether facts are objectively reasonable ultimately up to the jury in a civil liability case involving force?

HOLDING: Yes

DISCUSSION: The Court noted that the "ultimate question is whether Officer Shelton's actions were objectively reasonable in light of the facts and circumstances," even though in fact, Wallace was not actually armed. The Court noted that there is a "real question" as to whether a jury "could disbelieve Shelton's account of the events leading up to the shooting." The plaintiffs put forth no evidence that cast Shelton's testimony into doubt. However, the Court noted that the district court had difficulty is finding that there were no genuine issues of fact is dispute and as such, summary judgment at this point was inappropriate. The Court dismissed the appeal.

[43] Cooper v. Cnty. Of Washtenaw, 222 F. App'x 459 (6th Cir. 2007).

Lombardo v. Ernst, 2014 WL 7243329 (6th Cir. 2014)

FACTS: On July 11, 2011, in Utica, Michigan, Lombardo and Scott decided to start breaking into cars and stealing items. When they spotted a police vehicle, they split up and ran. Officer Ernst, from the adjacent town of Sterling Heights, responded. When he arrived, a Utica officer already had Scott in custody, who was then convinced to call Lombardo and lure him into a trap. As Lombardo approached, Ernst ordered him to stop, but Lombardo walked casually into the roadway. Ernst went after him and seized him, and Lombardo "began squirming and questioning the reason" for being stopped. He became even more aggressive as they approached the cruiser. Ernst struggled to try to handcuff Lombardo, hampered by the long-sleeves of his shirt and rainy weather. Ultimately, both men were struck by a passing motorist and injured.

Lombardo filed suit under 42 U.S.C. §1983, arguing a Fourth Amendment violation. Initially the Court did not grant Ernst qualified immunity but reversed that decision, finding that the situation was the "accidental effect of otherwise lawful government conduct." Ernst was awarded summary judgment and Lombardo appealed.

ISSUE: Is negligent force actionable under 42 U.S.C. §1983?

HOLDING: No

DISCUSSION: The Court agreed that this was not a situation involving a constitutional violation. The court looked to Sacramento v. Lewis, in which the plaintiff was killed by the actions of a third party, during the course of a pursuit. No evidence was offered to suggest that "Ernst acted with a purpose to harm" Lombardo – and he was in fact, injured himself. At most, Ernst may have been negligent, but that does not state a claim under §1983, given that "actual deliberation by the officer is not practical." In this situation, "only police conduct intended to harm Lombardo or to worse his legal plight" would be enough to state a claim.

The decision was affirmed.

Bolden and Martin v. City of Euclid, 2014 WL 6871655 (6th Cir. 2014)

FACTS: On the day in question, Bolden and Martin were walking in their neighborhood in Euclid. As they walked past Officer Doyle's house, he "drove up to them, exited his vehicle, and accused them of trespassing on his property and looking into his security cameras." They denied it. Doyle pushed Martin into Bolden and ordered them to get on the ground. Bolden complied, but Martin walked away, intended to call his mother and extracting his cell phone. Doyle smacked it out of his hand and threw his headphones to the ground, breaking them. He forcibly took Martin to the ground and handcuffed him. Bolden was also handcuffed.

Backup arrived and both were taken into the station's roll call room. Both were questioned by multiple officers. Bolden wrote out a report but indicated that they were walking past the house – Doyle made him change that to indicate they were on his driveway. Both were charged in juvenile court with trespass. Although the court found probable cause, the charges were dismissed against Bolden and martin elected to enter a juvenile diversion program. (This required Martin to admit, on the record, that he had been trespassing.)

Both filed suit under 42 U.S.C. §1983 against Doley and Officer Studley and Chief Brickman. They later learned that there were other complaint Doyle regarding use of force against juveniles. The District Court gave summary judgment to the officers; Bolden and Martin appealed.

ISSUE: Is force allowed even for a minor offense?

HOLDING: Yes

DISCUSSION: The Court noted that both were collaterally estopped from challenging the probable cause of their arrest because Martin admitted it and Bolden was found by the juvenile court to have probable cause to justify the arrest. Bolden argued that he shouldn't be expected to appeal what was, in all, a favorable ruling – but the Court indicated that he should have appealed the unfavorable ruling that he had, in fact, trespassed. As such, the false arrest claim was properly dismissed.

With respect to the force used, the Court noted that Bolden in fact complied with commands and the only force claimed was when Martin was allegedly pushed into him. With respect to Martin's claim, the Court agreed that criminal trespass was a minor charge. However, Officer Doyle was justified in using some force to secure him, since he was not following orders. He also refused to sit on the ground, which allowed Doyle to use some force as well.

The Court affirmed the dismissal of the action.

Cook (Pecola and Starsky) v. Bastin, 2014 WL 5472093 (6th Cir. 2014)

FACTS: On April 18, 2010, Campbell was living at a Lexington group home. He "suffered from nonverbal autism and severe mental retardation." He could follow one-step directions. He had displayed a great deal of agitation and aggression toward others, along with other troubling behaviors. That day, he woke up from a nap, "stripped naked and ran around uncontrollably, at one point jumping out a window before Dickey [a staff member] brought him back inside. He did extensive property damage inside the house. Dickey called for help from Hatter, the agency's "Crisis Manager." Hatter tried to calm Campbell, who attacked him several times. He administered prescribed medication to no effect; Campbell continued his violent behavior.

They called 911 and Officer Wallace (Lexington PD) arrived. He was told what was going on and that Campbell needed to go to Eastern State Hospital. At no time, however, was he told Campbell was nonverbal. He observed Campbell's extreme behavior and called for backup; Officer Smith arrived.

The two officers approached Campbell, along with Hatter. Campbell was handcuffed without incident but while waiting for an ambulance, Campbell began to move quite a bit – so they had him sit on the floor. Suddenly he became agitated and at some point, rolled into a face-down position, thrashing and kicking. The officers and Hatter tried to immobilize Campbell, but at no point were the officers directly on top of him. (Hatter was, however.) Campbell was able to get one hand out of a cuff and raise up a few inches, but then "closed his eyes, took a deep breath, and collapsed, falling unconscious." He died and the autopsy report indicated, among other things, excited delirium.

Campbell's estate filed suit against all parties. The District Court granted qualified immunity and summary judgment to the police defendants, and the Estate appealed.

ISSUE: Does the Fourth Amendment require that officers always make the "best" choice?

HOLDING: No

DISCUSSION: As part of the Estate's evidence, it submitted a report (the "Peters Report") from a police practices expert that listed several things the officers should have done or known, such as that they should have left Campbell unrestrained or prevented Hatter from lying on top of Campbell. The Court noted that the "Fourth Amendment … does not require police officers to take the better approach." The Court found that none of the men were putting their weight on Campbell's back and that instead, they officers were kneeling on the floor and trying to hold him down, and there was no evidence to contradict that.

With respect to handcuffing, the Court found no indication that constituted excessive force, or that it was unreasonable to apply the handcuffs when he was calm. The officers knew, however, that he could become agitated at any moment and the Court agreed it was proper to secure him. It was further proper to subdue him, as they knew he could , and did, pose an immediate threat to himself, the officers, the staff and others. He was trying to escape from his handcuffs and did get out of one of them. It was not even necessary for the officers to take him down, he was already on the ground, and it was proper for them to subdue him. Perhaps in hindsight, all three weren't actually needed to do so, but that is not the purpose of the court to determine. The Court agreed that the use of force was proper against him.

Further, the Court agreed it was proper to allow Hatter to be directly involved, given his knowledge of Campbell and the fact he was specially trained to deal with residents who were out of control. The Court concluded that his death, while tragic, "does not change the facts: the officers acted reasonably in what was a volatile situation involving a man whose disabilities had made him violent toward his caretakers and a clear threat to others."

The Court upheld the dismissal.

42 U.S.C. §1983 - WARRANT

Newman v. Township of Hamburg, 773 F.3d 769 (6th Cir. 2014)

FACTS: In the wee hours of February 28, 1992, Chappelear was murdered in Hamburg Township, Ohio. Newman became the prime suspect, as his weapon was the murder weapon. It was found in a duffle bag, along with hairs that were similar to Newman. A witness placed two young men, matching the description of Newman and his friend Kulpa, in a car that resembled Kulpa's, near the scene. Sgt. Calhoun presented this information to get an arrest warrant. Ultimately Newman was convicted of murder. Fifteen years later, however, his conviction was overturned, with the court finding insufficient evidence to have convicted him.

Newman filed suit against Sgt. Calhoun, under malicious prosecution and §1983. The trial court denied Calhoun's motion for summary judgment, and he appealed.

ISSUE: Do minor discrepancies between a warrant and a statement lead to civil liability?

HOLDING: No (but see facts and discussion)

DISCUSSON: First, the Court looked to Newman's claim that Sgt. Calhoun "deliberately or recklessly mischaracterized Masters' statement in his request for a warrant." Although there were slight differences between Calhoun's version and one given by another officer, they were not contradictory. The Court noted that there were numerous other uncontested facts in the affidavit, all of which readily supported probable cause. The decision that freed Newman only indicated that there was insufficient evidence to convict, "it said nothing about probable cause."

The Court reversed the decision, finding summary judgment for Calhoun.

42 U.S.C. §1983 – K-9

Greco v. Livingston County / Clayton, 2014 WL 7240680 (6th Cir. 2014)

FACTS: "During a search and rescue gone awry," Deputy Clayton's dog "sunk its teeth into the woman he was looking for." The incident began on September 30, 2012, when Greco drove her car into a ditch. She was "tipsy but unharmed," and she climbed out and walked to a nearby gas station, where she encountered two EMTs. Realizing she was intoxicated, they threatened to call the police – she fled. Deputy Clayton responded to the EMT's report of a possibly DWI, accompanied by his dog, Diago, and a civilian ride-along, Stuart. Diago was set to tracking Greco. Deputy Clayton was concerned about her wellbeing, having seen the car in the ditch and knowing that she was not dressed for the cold and wet weather. He and Diago entered into a swampy area.

"All hell broke loose," when Clayton slipped and almost fell on Greco. Diago then clamped down on her leg. Once he realized she wasn't armed, he called off Diago and the EMTs assisted in bringing her back to the gas station.

Greco's story was different, claiming that she'd gone into the brush to urinate, and was doing so when two men approached with flashlights. She was trying to comply with their commands when the dog was "sicked" on her. Stuart stated that Greco was sitting on some rocks and became belligerent, and that the dog probably bit her because she was kicking at him. But, no matter what happened, Greco had a "nasty injury to her thigh courtesy of Diago."

Gerco filed suit against Clayton and the Sheriff's office. Clayton moved for summary judgment. It was denied and he appealed.

ISSUE: Must a court deny summary judgment if there are facts in dispute?

HOLDING: Yes

DISCUSSION: The Court noted that the issue at this point in the proceedings with whether a jury could believe that Clayton set the dog on Greco intentionally. Further, even if the initial bite was intentional, it was still necessary to consider the delay in removing Diago when it was determined she was not a threat. The Court upheld the denial of summary judgment.

42 U.S.C. §1983 – FIRST AMENDMENT

Occupy Nashville v. Haslam, 769 F.3d 434 (6th Cir. 2014)

FACTS: In October, 2011, protestors in the Occupy movement "established an around-the-clock presence" on a state-owned public plaza in Nashville. After several weeks, they met with state officials to "discuss safety and health concerns."[44] Relying on Clark v. Community for Creative Non-Violence, the state imposed restrictions on the time and manner the plaza would be used.[45] A curfew was set and several protestors were later arrested as a result. They brought suit under 42 U.S.C. §1983. The District Court ruled that the state officials were not entitled to qualified immunity, and they appealed.

ISSUE: Does the First Amendment require a public area to have no rules?

HOLDING: No

DISCUSSION: The Occupy protestors argued that no public hearings or comments were done with respect to the new policy nor did the city follow rules of implementing the policy as an emergency. The Court discussed a number of issues, ultimately focusing on the issue of whether the state officials violated any clearly established right, and as such, qualified immunity was appropriate.

The Court looked to Saucier v. Katz, in which it was called upon to determine if "a constitutional right would have been violated on the facts alleged" and "whether the right was 'clearly established."[46] The Court focused on the second step, and noted that for such a right to be clearly established, "the contours of that right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[47] The Court must look to "existing precedent" to do so.[48] The Court looked to Clark, and noted that the Court, in that case, had "expressed 'serious doubt that the First Amendment requires the [government] to permit a demonstration involving a 24-hour vigil and the erection of tents to accommodate 150 people.'" The Court noted that whether the group was camping or simply present on the plaza during the prohibited hours, their presence was causing "increasingly chaotic, unsanitary, and dangerous conditions" on the plaza. The policy was crafted with Clark in mind, and even if there was disagreement, what mattered with was reasonable government officials would have understood. It was certainly not clear that the First Amendment permitted "an unfettered right to threaten the health and safety of the public or

[44] The area had insufficient sanitary facilities and in addition, the protestors had been joined by, and victimized by, homeless individuals and gang members.
[45] 468 U.S. 288 (1984).
[46] 533 U.S. 194 (2001).
[47] Anderson v. Creighton, 483 U.S. 635 (1987).
[48] Plumhoff v. Rickard, 134 S.Ct. 2012 (2014).

the security of private property."[49] In any event, the Court agreed the actions of the officials were not unreasonable under the "generally unsafe and deteriorating conditions" present at the plaza.

The Court reversed the order denying qualified immunity to the state officials involved.

42 U.S.C. §1983 – HARMLESS ERROR

Womack v. Conley, 2014 WL 6997493 (6th Cir. 2014)

FACTS: Womack is a criminal defense attorney in Kentucky. He was investigated by Conley(KSP) for illegal purchase of prescription drugs. He allegedly purchased drugs from Knight - he was representing her son in a criminal case. Ultimately, Knight was wired and met with Womack, and they discussed the possibility of her buying drugs as a police informant. She was provided with drugs and eventually, Womack was arrested and the drugs recovered from his desk. (He later stated Knight tossed the bag on his desk when he wasn't paying attention.) In the interim, Conley's wife, a social worker, filed a bar complaint against Womack that was later dismissed.

Womack was charged with possession of a controlled substance. During a hearing, Conley testified that Knight received nothing for her assistance. He later "tried to explain this omission (she'd actually received $300) in his deposition by indicating that he was not familiar with the term 'exculpatory evidence,' had never been instructed that he must 'give up exculpatory evidence,' and that in any event he did not believe that paying an informant for her assistance in an investigation is a fact that should be disclosed to the defendant." The Court found probable cause against Womack for the initial charges, but dismissed those that had been tacked on later. At a grand jury he again denied knowing if Knight had received anything. Ultimately Womack was acquitted.

Womack filed suit against Conley, under various claims under 42 U.S.C. §1983. The District Court gave summary judgment and Womack appealed.

ISSUE: Is an officer's lack of knowledge about a legal issue, that does not lead to any "harm," irrelevant?

HOLDING: Yes

DISCUSSION: The Court noted that there was no real evidence of a conspiracy between all of the parties and affirmed summary judgment with respect to that claim. The Court also found that there was sufficient probable cause to uphold his initially case. Further, any failure to train claim regarding Conley's lack of knowledge and withholding of exculpatory evidence was harmless, as it did not lead to any improper actions.

The Court affirmed the dismissal.

[49] See also Adderly v. Florida, 385 U.S. 39 (1966).

INTERROGATION

U.S. v. Weir, 587 Fed.Appx. 300 (6th Cir. 2014)

FACTS: On May 31, 2011, Weir approached Ernst (a 75-year-old lady) while she sat in her car at a mall in Crestview Hills. He ordered her to move into the passenger seat, showing a gun and a knife, and then drove her to Ohio. She refused to give him the PIN to her bank account. He finally gagged her and tied her to a tree while he took her purse and car. The car was later found abandoned and her bank card was used to buy cigarettes and gas. Ernst was able to free herself.

On December 5, 2011, Weir robbed a bank in Covington – he never showed a gun but the teller believed he was pointing a gun at her, through his jacket pocket. When Det. West, received a tip that Weir was involved, he brought him in for questioning. Weir confessed to both crimes, giving a number of details. He later moved to suppress the confession but that was denied. He was convicted of kidnapping and armed bank robbery in sequential trial. Weir then appealed.

ISSUE: Does just being under the influence of intoxicants invalidate any statement?

HOLDING: No

DISCUSSION: Weir argued that he "never affirmatively waived his Miranda rights and instead made an ambiguous request for an attorney." He also argued that he was under the influence of drugs and alcohol at the time he confessed, making it invalid. The Court noted that he was given the warning and acknowledged it, and went on to answer the detective's questions, which indicated that he implicitly waived the rights. He mentioned an attorney but made it clear he was not actually asking for one. With respect to his intoxication, and having available a video recording, the Court agreed he was "sufficiently sober to knowingly and intelligently waive his Miranda rights." Further, the Court found no indication that is confession was involuntary due to coercion by officers.[50]

Further, the Court agreed that his transport of Ernst, across state lines, was sufficient to prove a kidnapping and that his demand for her PIN was enough to find the requirement that he was doing it for "ransom or reward or otherwise." Further, Ernst testified that he used a "real gun" – rather than the pellet gun he alleged – and that was sufficient to find he used a firearm during the crime, enhancing the charge. (He also admitted to having a gun, although he never showed it, during the bank robbery.)

The Court upheld his convictions and sentence.

S.L. v. Pierce Township, 771 F.3d 956 (6th Cir. 2014)

FACTS: Officer Homer (Pierce Township PD) responded to a call to S.L.'s home – his mother thought he'd been attempting to set a fire. Homer was arrested for aggravated arson. He was turned over to a juvenile detention employee, Bartley, who signed the complaint prepared by Homer. (Homer was not administered an oath, as required, although the form indicated that he had.) The charges were later dismissed. S.L. – through his parents – filed suit against Homer and

[50] U.S. v. Mahan, 190 F.3d 416 (6th Cir. 1999).

numerous other parties, alleging false arrest, malicious prosecution and a lack of authority to detain S.L. The court dismissed all claims and S.L. appealed.

ISSUE: Is someone who accepts a prisoner from another required to make a separate assessment of the validity of the detention?

HOLDING: No

DISCUSSION: Among other issues, S.L. argued that Bartley's action caused his detention, as he accepted Homer's complaint and did a risk assessment on S.L. The Court noted that it was not Bartley's duty to make an independent determination of probable cause, and that to require that would require a rule that "every police officer, corrections officers, and courtroom deputy who takes custody – however briefly – of an arrestee such as S.L." would have to make their assessment or risk §1983 liability. That, the Court disagreed with and upheld the dismissal of the claim against Bartley.

TRIAL PROCEDURE / EVIDENCE – BRADY

Bies v. Sheldon, 2014 WL 7247396 (6th Cir. 2014)

FACTS: Bies was convicted in Ohio for the kidnapping, assault and murder of a 10-year-old boy in Cincinnati, in 1992. Gumm had confessed and made statements indicating that Bies was also involved, although he did not know Bies by name. Detectives travelled to Hazard to question Bies, where they advised him of his Miranda rights and had him sign a written waiver, although in fact, he was functionally illiterate. He denied any involvement and, the Court noted, "there were arguably some indications of Bies' diminished mental capacity from the outset of the interrogation." During the course of the interrogation, the detective "abruptly turned off the tape recorder," and it was later explained that they did so because of discrepancies in Bies' story. They told him a number of facts about the case. His later answers to questions ranged from "highly detailed" to "suspiciously vague." Often he simply agreed with what he was told and sometimes "used an uncharacteristically advanced vocabulary and formal terminology to describe certain details" – given his third grade language skills. He agreed to return to Ohio, where he did a walk-through of the scene. His narration continued to be inconsistent and vague and he often went along with what the detectives suggested. "He appeared eager to please the detectives." In a final interrogation, not recorded, he allegedly admitted to participating in the assault and murder, although Bies denied that. Despite motions, much of the evidence, in particular exculpatory evidence, was never disclosed.[51] He was sentenced to death, but that was vacated after it was determined it was intellectually disabled. Bies appealed his conviction through various proceedings.

ISSUE: Must all exculpatory evidence be disclosed to the defense?

HOLDING: Yes

[51] Such evidence was not disclosed due to the fact that, at the time Bies was tried in 1992, Hamilton County had in place a "homicide book" system under which the investigative agency gave to the prosecutor only the evidence that it believed would aid in prosecution. See Jamison v. Collins, 291 F.3d 380 (6th Cir. 2002) ("[The Cincinnati Police Department] would gather inculpatory material into a homicide book that was then sent to the prosecutors; exculpatory material was excluded from the homicide book.") Consequently, "the prosecutor never became aware of exculpatory evidence, and did not disclose it as required by Brady."

DISCUSSION: Among other issues, the Court noted that it was "undisputed that the State failed to turn over hundreds of pages of evidence gathered during the murder investigation." Instead, it was obtained as part of routine discovery in the post-conviction habeas process, almost nine years later. The evidence included other potential suspects, including two who had apparently confessed, as well as impeachment information. The Court looked to the components of Brady:

> "[T]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[52] The third component is sometimes referred to as the "materiality" requirement." The State agreed that it possessed the information and that it was potentially exculpatory, leaving only the issue of materiality to be discussed. The Court noted that evidence was material if it ""could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[53] The "omission must be evaluated in the context of the entire record."[54] "Withheld information is material under Brady only if it would have been admissible at trial or would have led directly to admissible evidence."[55]

In this case, the Court agreed that "considering the quality and quantity of the evidence that the State failed to disclose in this case, the potential for that evidence to have affected the outcome of Bies' trial is inescapable." The failure, in particular, to disclose the existence of other legitimate suspects, was crucial. Compared with the "paltry evidence" that was presented, the Court agreed that the "capacity for the undisclosed evidence to have affected the outcome of Bies' trial becomes even more apparent." There was no physical evidence whatsoever linking him to the crime, and the remaining evidence was, at best, dubious. The only evidence of the alleged confession came from the "self-serving testimony of the investigating officers." And even if he made the confession, the legitimacy of his confession was doubtful.

The Court affirmed the grant of habeas corpus on the Brady claim.

Eakes v. Sexton, 2014 WL 6657037 (6th Cir. 2014)

FACTS: On May 22, 1998, Christman left his Nashville home at 9:30 p.m. following a phone call. At about 1030 p.m., Rosser, manager of the Motel 6 just a few miles away, knocked on a door of a room registered to Barnes. She noticed that some of the curtains had been ripped from the hooks of the window. She knocked repeatedly, threatening to call the police if someone didn't answer. Barnes opened the door slightly and explained that "they" were having rough sex. She told him that if there were any disturbances, they would have to leave.

The next day, after Barnes had left, the housekeeper found blood and signs of a violent struggle. Police were called and secured the room. They went to Barnes' home, finding blood on his truck and on clothing in the washing machine. They learned he regularly rented motel rooms – his wife

[52] Strickler, 527 U.S. at 281-82.
[53] Kyles v. Whitley, 514 U.S. 419 (1995).
[54] U.S. v. Agurs, 427 U.S. 97 (1976).
[55] Wood v. Bartholomew, 516 U.S. 1 (1995).

would not let him do drugs in the house. They tracked down Barnes and Eakes (his nephew) at a nearby Super 8.

Both gave taped confessions that they'd killed Christman after an argument over cocaine. Barnes guided them to where the car and body were located and Eakes did the same with the axe (with which he'd been bludgeoned" and the blood hotel bedding. Backtracking, using the vehicle, Officer Malone went to the Christman home. His mother and stepfather were "very evasive" – despite the fact he'd then been missing some 36 hours. A victim advocate who interviewed them days later indicated that they did not want to believe Christman was involved with drugs and believed he was "set up." Both implicated Watkins, along with Kevin and Michael Childs in interviews with the ADA, as well. Eakes was never given any of this information despite having requested Brady material.

Eakes was convicted of murder. Having exhausted state remedies, he took a federal habeas petition and eventually, the above information was disclosed when the prosecutor's files were turned over. However, the District Court denied the petition. Eakes then appealed.

ISSUE: Is there a strong duty to disclose potential Brady material?

HOLDING: Yes

DISCUSSION: The Court noted that to prove a Brady violation, the petitioner must "establish three elements (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is in impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued."[56] The Court affirmed that the duty to turn over impeachment evidence was strong.[57] Further, the "materiality of Brady evidence depends almost entirely on the value of the undisclosed evidence relative to the other evidence produced by the state." And, if impeachment evidence was found to have been able to seriously undermine a key witness's testimony, it would be material. The Court agreed that witness bias was "always relevant" as well.[58]

The Court agreed that the undisclosed evidence was highly favorable to Eakes, as it documented the fact that Christman's mother had significantly changed her statements over the time frame, including adding that Christman had valuable items (ring and watch, as well as cash) with him when he left the house. The Court noted that the trial court did not review the undisclosed evidence collectively, but instead, dissected each item piecemeal, which was against precedent.

The Court vacated the denial of the claim and remanded it back for further proceedings.

---

[56] Brooks v. Tennessee, 626 F.3d 878 (6th Cir. 2010); Strickler v. Greene, 527 U.S. 263 (1999).
[57] Giglio v. U.S., 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959); U.S. v. Bagley, 473 U.S. 667 (1985).
[58] Davis v. Alaska, 415 U.S. 308 (1974).

TRIAL PROCEDURE / EVIDENCE – IDENTITY OF INFORMER

U.S. v. Sierra-Villegas, 2014 WL 7271420 (6th Cir. 2014)

FACTS: Sierra-Villegas was charged as part of a massive drug distribution ring. In June, 2012, a CI had contacted the Dept. of Homeland Security concerning suspects selling large amounts of methamphetamine in Michigan. The CI arranged a meeting between an undercover officer, posing as a dealer, and Garcia – and Garcia was sent a text message by Sierra-Villegas concerning the location where he could get the methamphetamine. Garcia became suspicious and asked to hold off on the transaction – and in the meantime, they were able obtain evidence against Sierra-Villegas regarding the deal.

At trial, the government did not call the CI or seek to admit any information regarding the CI. However, because a phone call was played in which the CI's voice was part, Sierra-Villegas was able to identify the CI. He sought to impeach the CI, to have his identity officially disclosed, and to call him as a witness. The trial court quashed the subpoena by which Sierra-Villegas attempted to use to call the CI has a witness.

Sierra-Villegas was convicted, he then appealed.

ISSUE: Is there an "identity of informer" privilege?

HOLDING: Yes

DISCUSSION: The Government sought to block the public disclosure of the CI, relying on the informant privilege under Roviaro v. U.S.[59] The privilege is qualified, and information about a CI, or their testimony, "may be admitted if the revealing evidence 'is relevant and helpful to the defense of an accused, or is essential to a fair determination not a cause." In this case, even though Sierra- Valllegas had independently already identified the CI, the government still had a valid reason to protect the informant's identity. Since he failed to identify how the testimony of the CI would assist in his defense, the Court agreed that it was proper to deny his motion. The Court agreed that the CI was "likely more involved in the charged conspiracy that a mere tipster would have been, but this does not in itself suggest that the CI's testimony would have been helpful to Sierra-Villegas." As such, the Court agreed that the CI's identity could be concealed.

The Court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

U.S. v. Harmon, 2014 WL 6601027 (6th Cir. 2014)

FACTS: During an investigation into child sexual exploitation, Harmon admitted to having had sex with numerous underage females. He was convicted and appealed.

ISSUE: May prior bad acts be introduced to show a state of mind?

[59] 353 U.S. 53 (1957). This privilege is codified in Kentucky as Kentucky Rule of Evidence 508.

HOLDING: Yes

DISCUSSION: Harmon argued that the statements were improperly admitted as "prior bad acts" under Rule 404(b). The Court, however, agreed that the testimony was, instead, introduced as evidence of his state of mind – and were introduced to show that he was attempting to persuade the putative "underage girl" to come to the location. The Court agreed it was properly admitted for that purpose.

The Court further agreed that his actions in convincing his putative victim to engage in unlawful, underage sex was sufficient to satisfy 18 U.S.C. §2422, which "criminalizes intent to persuade, induce, entice, or coerce a minor and is not concerned with a defendant's intent to actually engage in sex with a minor."[60] Further, evidence of the contents of the bag he had in the car and his actual presence at the meeting site suggested he actually intended to meet his victim.

Harmon's conviction was affirmed.

COMPUTER CRIME

U.S. v. Elbe, 2014 WL 7247384 (6th Cir. 2014)

FACTS: The FBI discovered that someone with the user name of "jessiecash" was sharing child pornography through at peer-to-peer sharing network. The user had logged into the system several times from hotels in Iowa. The common occupant each time, at the hotels, was Elbe, who was ultimately tracked back to having a residence in Central City. They obtained a search warrant, discussing why and how child pornography might be found there. During the search, agents seized 130,000 images of child pornography and videos. Elbe was charged and moved for suppression. When denied, he took a conditional guilty plea and appealed.

ISSUE: Must there be a nexus between a computer user and their residence, for a search warrant for that location?

HOLDING: Yes

DISCUSSION: Elbe argued that the search warrant was deficient in that it used boilerplate language, did not establish a nexus between the evidence and the location, and that the information was stale. Taking each in turn, the Court noted that the boilerplate described "characteristics common to individuals involved with child pornography and the impact of computers on child pornography." The Court noted that in addition, the affidavit included "plenty of details" specific to Elbe and was more than sufficient.

With respect to the nexus, the Court noted that "an affidavit including both information connecting the defendant to the offending username and information about where the defendant lived established probable cause to search the defendant's residence."[61] The Court noted that such an inference is permitted in such cases, "because these crimes are committed in a private place with

[60] U.S. v. Bailey, 228 F.3d 637 (6th Cir. 2000)
[61] U.S. v. Lapsins, 570 F.3d 758 (6th Cir. 2009).

high-speed Internet." The username was connected to Elbe, as was the Central City residence. That was sufficient.

Finally, with respect to the staleness argument, the Court noted that U.S. v. Lewis outlined the four factors to measure staleness :

(1) The character of the crime (chance encounter in the night or regenerating conspiracy?),
(2) The criminal (nomadic or entrenched?),
(3) The thing to be seized (perishable and easily transferrable or of enduring utility to its holder?),
(4) and the place to be searched (mere criminal forum of convenience or secure operational base?)[62]

The Court noted that child pornography is not a fleeting crime but instead is carried out in secret over a long period of time. Elbe was entrenched, having lived in the Central City location for some time, even though he did travel. Child pornography "has a potentially infinite life span" because the material "can be easily duplicated and kept indefinitely even if they are sold or traded."[63] And finally, a residence is generally considered to be a "secure operational base." The Court agreed that the evidence was not stale.

The Court upheld his conviction.

FIRST AMENDMENT – RETALIATORY DISCHARGE

Kindle/Silveria/Adkins v. City of Jeffersontown, 2014 WL 5293680 (6th Cir. 2014)

FACTS: Kindle, Silveria and Adkins (Handy) worked for Jeffersontown, the first as a police officer and the latter two as dispatchers. All three were fired after circulating a report alleging "various incidents of misconduct" on the part of then Lt. Col. Emington. The report was sent to the Mayor, the police chief and members of the city council. Prior to the report, they had informed the police chief that she had created a hostile work environment for them which caused them to go on medical leave. While Silveria and Handy were off, other JPD officers reported misconduct by Emington. On October 10, 2006, the three reported to the mayor and indicated they were considering filing a Whistleblower report, which they did a few weeks later, under KRS 61.102. A few weeks later, they withdrew their compliant, "citing retaliatory action that Jeffersontown had taken against them." The Ethics Commission reviewed the matter and dismissed the complaint with prejudice. Emington then filed a complaint under the city's civil service commission. At the scheduled hearing, Silveria and Handy stated they would be taking the matter to court and left, Kindle stayed but did not present evidence. All three were terminated.

The three filed suit in federal district court, alleging violations of the Kentucky Whistleblower Act and the First Amendment, under 42 U.S.C. §1983. The District Court granted the summary judgment motion requested by the Jeffersontown defendants. Kindle, Silveria and Handy appealed.

ISSUE: Does the Kentucky Whistleblower Act apply to cities?

[62] U.S. v. Lewis, 605 F.3d 395 (6th Cir. 2010); U.S. v. Abboud, 438 F.3d 554 (6th Cir. 2006).
[63] U.S. v. Frechette,

HOLDING: No

DISCUSSION: The Court noted that while the case was pending, Kentucky held in Wilson v. City of Central City, that the Kentucky Whistleblower Act does not apply to cities.[64] As such, that claim was abandoned. With respect to the First Amendment claims, the Court noted that "statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors."[65] However, that protection does not apply if the "speech was knowingly false or made with reckless disregard for the truth."

The Court noted that its earlier opinion "did not expressly or impliedly decide whether[their] speech was true" as that issue was simply not raised. As such, the truthfulness (or lack of it) of the speech could be raised as an issue. However, the civil service commission had the authority to "issue a factual finding on the veracity of plaintiffs' speech as it related to Emington's complaint." They made explicit findings in that regard, finding the speech false. As such, they were estopped from arguing the opposite.

The Court agreed their First Amendment claims failed and the judgment of the district court affirmed.

MISCELLANEOUS – RELIEF FROM DISABILITY

Tyler v. Hillsdale County Sheriff's Dept. (Michigan), 2014 WL 7181334 (6th Cir. 2014)

FACTS: In 1986, during an emotionally devastating divorce, Tyler was committed briefly to a mental institution. Following treatment (for which he declined medication), he returned home and back into the workforce, for close to 20 years. In 2012, he went through a substance abuse evaluation in which it was concluded that the situation was a brief reaction and that he subsequently showed no depression or mental illness. He had remarried and had a close relationship with his children. However, as a result, he had been unable to purchase a firearm because of his "prior involuntary commitment," pursuant to 18 U.S.C. §922(g)(4). When he attempted to do so in 2011, the Hillsdale County SO denied him and he appealed the denial through the FBI. That appeal was denied, explaining that federal law had deferred this type of appeal (to be removed from the "disability") could only be pursued through the state, and since, Michigan had apparently not developed the required program, his rights could not be restored.[66]

Tyler filed suit in federal court, arguing that since there was no procedure in Michigan to assist him, his federal rights were being denied. The state defendants moved for dismissal, which was granted. (The federal defendants were dismissed under a different argument.) The county defendants remained in the case, and Tyler appealed against the county and federal defendants.

---

[64] 372 S.W.3d 863 (Ky. 2012)

[65] Pickering v. Bd. Of Educ. Of Twp. High Sch. Dist. 205, 391 U.S. 563 (1968).

[66] It did not mention that he could apply to the ATF directly, but that Congress had denied funding for a federal program to relieve his from the disability.

ISSUE: Must there be a process to allow someone to regain their firearms rights after being involuntarily committed?

HOLDING: Yes

DISCUSSION: The Court elected to "consider not the *what*, *where*, *when*, or *why* of the Second Amendment's limitations—but the *who*" – specifically, whether Congress could prohibit "firearm possession by all individuals previously committed to a mental institution?" Previous cases had made it clear that the Second Amendment does have limits.[67] The Court underwent a lengthy historical analysis of when and how it came to be that those who were mentally ill or of "unsound mind" were denied firearms ownership, and concluded that it was of relatively recent origin.

The Court agreed that the statute in question does further a governmental compelling interest. However, the Court agreed that "not all previously institutionalized persons are mentally ill at a later time." Congress had "*already* determined that the class of individuals previously committed to a mental institution is *not* so dangerous that all members must be permanently deprived of firearms" by creating the original "relief-from-disabilities program." However, at this time, only about half of the states have created a state program and the federal government has no equivalent federal program as Congress has not chosen to fund it – leaving Tyler in a Catch-22.

After reviewing all of the other prohibitions under federal law (age, status as felon, domestic violence, illegal alien, etc.) the Court noted that in this case, the statutory prohibition is permanent and "targets a class that is potentially non-violent and law-abiding." Certainly a person previously institutionalized might commit a gun crime, but "that is true of all classes of persons." Congress had provided for the prohibition to be relieved.

The Court concluded that Tyler had a valid claim under the Second Amendment and reversed and remanded the dismissal of his claim.

NOTE: *Kentucky's "relief from disability" statute is codified at KRS 237.108.*

[67] See District of Columbia v. Heller, 554 U.S. 570 (2008) and McDonald v. City of Chicago, 561 U.S. 724 (2010).